

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR PETITIONERS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,647

WALTHAM WATCH COMPANY,
a corporation,
HARRY ARONSON, BEN COLE and MORRIS DRAFT,
individually and as officers of said corporation,

v.

FEDERAL TRADE COMMISSION,

Petitioners,

Respondent.

Appeal From Final Order Of The
Federal Trade Commission

United States Court of Appeals
for the District of Columbia Circuit

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9
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STATEMENT OF
QUESTIONS PRESENTED

1. Whether the Order of the Federal Trade Commission is contrary to law and whether the Order, or any portion of it is supported by any substantial evidence?
2. Whether Commission policy since the entry of the Initial Decision upon the Complaint, has materially altered with reference to the subject matter of the Complaint, and, if so, whether the Complaint and Order entered thereon would issue under present policy, and, if so, whether the evidence adduced at hearings would support the Order inferred under present Commission policy?
3. Whether the use by petitioners of the trade name "Waltham" on imported watches is false, misleading or deceptive?

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FEDERAL TRADE COMMISSION,

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Appeal From Final Order Of The
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BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

The Complaint below issued on May 15, 1961.¹ It alleged that petitioners engaged in specific deceptive acts and practices in violation of Section Five of the Federal Trade Commission Act.²

¹ J.A. 1-6.

² 15 U.S.C.A. 45.

After hearings, an examiner of the Commission entered an Initial Decision dated October 18, 1962.³ Exceptions to the Initial Decision were filed by petitioners and the Commission entered its "Decision and Final Order" on February 28, 1964.⁴

Petition for Review was filed with this Court on May 25, 1964,⁵ and by its prehearing Order entered June 30, 1964,⁶ this Court adopted Stipulations of the parties which included time for filing briefs. It was therein provided that petitioners' brief be filed on or before October 15, 1964.

Upon motion of petitioners, the time for filing this Brief was extended until October 28, 1964, by Order dated October 26, 1964.⁷

The jurisdiction of this Court is founded upon Section Five (d)(e) of the Federal Trade Commission Act.⁸ (38 Stat. 719, Act of September 26, 1914, as amended.)

STATEMENT OF THE CASE

The complaint below charged that petitioners' advertising and marketing practices are deceptive with respect to (1) the use of the trade name, "Waltham,"⁹ (2) prices and preticketing,¹⁰ (3) jewel content of watches,¹¹ and (4) guarantees.¹²

³J.A. 10b-118

⁴J.A. 123-125

⁵See Appendix A, this Brief.

⁶Appendix B, this Brief.

⁷Appendix C, this Brief.

⁸15 U.S.C.A. 45(d)(e)

⁹J.A. 3-4, Complaint, Par. Seven

¹⁰J.A. 2, Complaint, Par. Three

¹¹J.A. 3, Par. Five and Six

¹²J.A. 3, Complaint, Par. Four

Hallmark, Inc. was incorporated in Illinois in 1948 and the individual petitioners here were also officers and directors of that company.¹³

The corporate petitioner, Waltham Watch Company, was incorporated in Delaware, on May 16, 1957.¹⁴

Pursuant to "Plan of Reorganization" Hallmark and Waltham merged in 1959 and Hallmark was dissolved.¹⁵

However, even prior to both the formation of the Delaware corporation and the merger of that company with Hallmark Inc., the latter company had acquired, in 1956, a license from the predecessor, Waltham Watch Company of Massachusetts, to use the trade name "Waltham" on watches.¹⁶ Later, after a spin off by the Massachusetts corporation of its watch and clock business to the present Waltham Watch Company, petitioner here, license to Hallmark, Inc. was continued and a new licensing agreement executed.¹⁷

This latter license was amended by a later agreement between Hallmark and the corporate petitioner.¹⁸

¹³J.A. 9, 10, 11, CX 1A & 1D. (Commission Exhibit)

The exhibits introduced into the record below were voluminous, many were not printed in the joint appendix. References herein to such exhibits in the original record are permitted by Stipulation of the parties entered in these proceedings: In this brief the references to the joint appendix will be given when the Exhibit referred to is included therein. If such reference is not given, it indicates that the exhibit referred to is included in the original record.

¹⁴J.A. 11, CX 2A-M.

¹⁵J.A. 12, CX 3A-B, CX 4A-D, June 13, 1959.

¹⁶J.A. 13, CX 5A-L, dated March 23, 1956.

¹⁷J.A. 14, CX 6A-6, dated July 16, 1957.

¹⁸J.A. 14, CX 7A-C, December 30, 1957.

The record contains samples of petitioners' advertising and price lists.¹⁹

The Massachusetts enterprise created by Aaron Dennison in 1849 was not incorporated in Massachusetts until 1923.²⁰ Control of that corporation was secured by interests identified as "Axler" in 1956 shortly after the corporation had granted the initial license to Hallmark.²¹ Later, in 1957, the Massachusetts corporation by means of a form of reorganization known as a "spin off" transferred to the Delaware corporation "all rights, licenses, trade-marks and trade names, subject to the license granted to Hallmark Inc."²² At the time of the "spin off" in 1957, the old Massachusetts corporation changed its name to "Waltham Precision Instrument Company." Since that date the corporate petitioner has been the only Waltham Watch Company.²³

The appendix to this brief includes samples of trade-mark registrations of the name "Waltham," owned by the Massachusetts corporation, licensed to Hallmark, Inc., divested to the Delaware corporation (petitioners) subject to the license and now owned by the merged corporate petitioner.²⁴

¹⁹J.A. 18-19, CX 12 A-B, J.A. 96-97, CX 13 (effective Jan. 1, 1959), CX 14, (effective July 1, 1959), CX 15 (effective July 1, 1958), CX 16 A & B; CX 17 (effective July 1, 1958), CX 18, J.A. 98; CX 19 A-B, J.A. 100; CX 20 (effective July 1, 1959); CX 21 (effective June 1, 1959); CX 22, J.A. 101; etc.

²⁰Stipulation, J.A. 55

²¹Stipulation, J.A. 55, See also, CX 5 A-L, J.A. 13, March 23, 1956.

²²J.A. 55-56

²³J.A. 56, See Stipulation, original record pages 96-100

²⁴These trade-marks are included also in the original record as appendices to Brief of Petitioners in Support of Exceptions to Initial Decision.

Origin of Watches

Both Hallmark under its various license agreements and the present corporate petitioners have used the name "Waltham" on imported watches primarily of Swiss origin. The company manufactures and assembles watches from various domestic and imported components—the movements being imported, primarily from Switzerland.²⁵

Prices

Petitioners preticket their watches with suggested retail prices.²⁶ Their price lists were distributed to customers, including wholesale catalogue distributors and contained, among other things, the suggested retail, the customer's cost and the manufacturer's selling prices.²⁷

Customers in the wholesale catalogue area of the market, coded the "dealer cost" into a system of pricing which indicated the "suggested retail" for comparison. Such (catalogue) customers regularly sell petitioners' watches at the coded prices, which are substantially less than the suggested retail prices.²⁸

Guarantees

The terms and conditions of petitioners' guarantee are set forth in their guarantee certificate.²⁹ It was the policy of the company to service and repair its watches for one year from the date of purchase unless

²⁵J.A. 60

²⁶CX 98, J.A. 59

²⁷J.A. 59-60, CX 13, 17, 20, 21, original record.

²⁸J.A. 59, 96-104

²⁹CX A-D, J.A. 24

the watch had been abused, and, thereafter to repair such watches without charge except for cleaning and oiling. Parts, in both instances, would be replaced without charge.³⁰

Jewels

Petitioners affixed a Resevoil plate containing either four or eight jewels to some of their watches. This (Resevoil) device is patented and its addition to the movement increases the jewel count. Although the jewels contained in the device are functional, they do not fall within the definition of the Commission for watch jewels, that is, they do not serve as frictional bearings and do not come into contact with a moving part at a point of wear. The petitioners stipulated all facts pertinent to this issue but reserved the right to object to the Order as a matter of law.³¹

STATUTES, REGULATIONS AND RULES

The Federal Trade Commission Act; 15 U.S.C.A. 45

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(a)(6) The Commission is empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.

(d) Upon the filing of the record with it, the jurisdiction of the Court of Appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

³⁰J.A. 64

³¹J.A. 3, Paragraphs Five and Six of the Complaint.
J.A. 103-104, See also "Initial Decision."
J.A. 109.

The Lanham Act; 60 Stat. 433, 458, Act of July 5, 1946, as amended;
15 U.S.C.A. 1064

Provided that the Federal Trade Commission may apply to cancel
on the grounds specified.....

The Patent Act of 1952; 66 Stat. 797, Act of July 19, 1952
C950 Sec. 1; 35 U.S.C.A.

101, Inventions Patentable;

Whoever invents or discovers any new and useful process,
machine, manufacture or composition of matter, or any new
and useful improvement thereof, may obtain a patent there-
for...

102, Conditions for Patentability; novelty....

A person shall be entitled to a patent unless -

- (a) The invention was known or used by others....or
patented or described in a printed publication...or
- (b) The invention was patented or described in a printed
publication....or in public use....or
- (c) He has abandoned the patent, or
- (d) The invention was first patented....in a foreign country
prior to the date of the application....or
- (e) The invention was described in a patent granted....
...by another...before the invention thereof by the
applicant...or
- (f) He did not himself invent the subject matter....or
- (g) Before the applicant's invention thereof, the invention
was made...by another.....

282, Presumption of Validity;

A patent shall be presumed valid. The burden of establishing
invalidity of a patent shall rest on a party asserting it.

Tariff Act of 1930: 19 U.S.C. 1001, Ch. 4, Schedule 3, Par. 367(a)(b)(g)

Printed as Appendix H, this Brief.

Guides Against Deceptive Pricing, Federal Trade Commission, promulgated January 8, 1964, printed as Appendix F this Brief.

Administrative Bulletin 64-10; Federal Trade Commission, May 6, 1964, printed as Appendix G this Brief.

STATEMENT OF POINTS

1. The Commission Order requires the individual petitioners to cease and desist using the name "Waltham" to designate or describe watches "without expressly... stating immediately in conjunction therewith the country of origin of each component... which is not entirely manufactured in the United States."³² This portion of the Order is not supported by any evidence. In addition, it is contrary to law, and in derogation of the rights inherent in the ownership of a trade name. It is novel in that it ascribes to the trade name "Waltham" the meaning that products upon which it may be used are made in the U.S.A. This portion of the Order is, in addition, in conflict with present Commission policy, as exemplified by Administrative Bulletin 64-10 dated May 6, 1964, and its enforcement against petitioners would be arbitrary and capricious since competitors using trade names of like historically domestic significance, will not become subject to similar orders, though their practices with respect to use of those names on imported watches and watches containing imported components are the same as petitioners.

2. The Order requires all petitioners to cease and desist advertising, disseminating or distributing any list, preticketed or suggested retail price "that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' (petitioners') trade area."³³

³²J.A. 124

³³J. A. 125

This portion of the Order is based upon findings 8 and 9 of the Commission,³⁴ which it substituted for findings 8 and 9 of the examiner.³⁵

There is no evidence to support substitute findings 8 and 9 of the Commission. The portion of the Order is contrary to law, and, in light of present Commission practice exemplified by its "Guides Against Deceptive Pricing," promulgated after the Initial Decision was entered below, similar orders will not be entered against competitors engaged in similar practices. Accordingly, enforcement of this portion of the Order would be arbitrary and capricious and a violation of administrative due process of law.

3. The Order requires the individual petitioners to cease and desist representing jewels as watch jewels, unless each of them so designated or represented serves a purpose of preventing against wear from friction by providing a mechanical contact with a moving part at a point of wear.³⁶

This portion of the Order is arbitrary and capricious, contrary to law and in conflict with a governing decision of this Court.

4. The Order requires all petitioners to cease and desist representing that their merchandise is guaranteed unless the nature, extent and conditions of the guarantee and the manner in which it will be performed are clearly set forth in conjunction with the representation of guarantee. This portion of the Order is not supported by any substantial evidence.

³⁴J.A. 123

³⁵J.A. 113

³⁶J.A. 124

SUMMARY OF ARGUMENT

1. The petitioner corporation owns, and at all times material, owned the trade name "Waltham." By 1898, that name had lost its primarily geographic significance and acquired a secondary meaning which identified it with watches sold by its owner. Waltham, like all competitors, has become an importer of watches and watch components. The use of the trade name, "Waltham," on such imported watches or watches containing imported components is not, *per se*, deceptive. The Order is contrary to law because it so holds and in essence establishes a novel concept — "Waltham" means "made in U.S.A."

a) Administrative Bulletin 64-10, dated May 6, 1964 is definitive of the present Commission policy with reference to country of origin. Competitors of petitioners will not be charged and subjected to an order similar to that here under review as a result of the policy change reflected in that bulletin. Waltham should be accorded the same treatment as will be accorded its most favored competitor under that policy. Consequently, the Order is arbitrary and capricious and contrary to law.

2. Findings 8 and 9 of the Commission are not supported by any substantial evidence and the Order entered thereon is contrary to law. There is absolutely no evidence that petitioners' "suggested retail prices" were not established in good faith. Good Faith was not an element of proof required by the Complaint. Its inclusion in the Order is based upon "Guides Against Deceptive Pricing" promulgated at about the same time the Order was entered but long after the Complaint issued and the evidence was entered. Nor is there any evidence to support the Order requirement that the petitioners' suggested retail prices exceed the highest price at which substantial sales are made in their trade area. Again, the margin between selling price and suggested retail in a trade area were not elements of the proceeding until the "Guides," above referred to, were promulgated shortly before the Order was entered. The Order with reference to preticketing is, therefore,

arbitrary and capricious, contrary to law and the case should be remanded for the taking of further evidence bearing upon the points here raised.

3. Patented Resevoil contains jewels that are functional and useful but do not serve as frictional bearings, that is protect against wear from friction by providing a mechanical contact with a moving part at a point of wear. That Definition of "jewels" was established before the Resevoil invention was patented. Its grant of patent represents that it is an advance in the prior art to which the definition is applicable. This Court has given a definition of a watch jewel which differs from that of the Commission as set forth in its Order.³⁷ The jewels used by petitioners here fall within that definition and the Order is arbitrary and capricious and contrary to law.

4. The evidence establishes that petitioners do clearly set forth the qualifications, terms and conditions of their guarantees and that their policy is to perform in accordance with such terms and conditions. Consequently, the Order in respect to petitioners' guarantee practice is not supported by any substantial evidence.

ARGUMENT

I. THE TRADE NAME "WALTHAM"

The individual petitioners are required by the Order to cease and desist using the name "Waltham" to describe or designate watches without stating in immediate conjunction therewith the country of origin of each component not entirely manufactured in the United States.³⁸

³⁷Tornek v. F.T.C., 276 F.2d 513

³⁸J.A. 116

Petitioners will concede that part 3 of the portion of the Order relating to the individual petitioners is proper in the circumstances of this case, but note that the use of the slogans upon which it is based was discontinued when the individual petitioners here acquired control of Waltham.

Although there is evidence that petitioners import movements from Switzerland and other components from various other countries,³⁹ there is no evidence that such imported components are improperly marked as to their country of origin.

In fact, the physical exhibits in evidence are marked in conformity with the requirements of the Tariff Act of 1930.⁴⁰

In the absence of evidence to the contrary, it must be presumed that components of petitioners' watches are marked to conform to the legal requirements as to country of origin. It is submitted that there is no such evidence and the presumption in favor of petitioners in this regard must persevere throughout this portion of the Argument.

All of petitioner's competitors are importers of movements and of other watch components. Many are traditionally associated with domestic manufacture, yet their trade names, like "Waltham", are being used on such imports. None have been charged, as has Waltham here, with deception involving the use of their traditionally American trade names on imported watches.

Several months after the Order was here entered by the Commission on February 28, 1964, the Commission abruptly changed its policy with respect to country of origin. That change of policy is reflected in Administrative Bulletin 64-10 dated March 6, 1964, which is printed as Appendix "G" (*infra*). Among other things, the Bulletin provides:

1. This Bulletin contains instructions which shall govern staff processing of all foreign origin matters.

.

There shall be cooperation and consultation at all times among the three Bureaus (Deceptive Practices, Industry Guidance, Economics) to achieve uniform compliance with these instructions.

.

³⁹ J.A. 59-60.

⁴⁰ 19 U.S.C.A. 1001, par. 367 (b)(g). See exhibits 44C, 92C and 98C.

2. Foreign origin matters involve:

- A. Affirmative misrepresentation of the country or place of origin of a product or its components, and
- B. Failure to disclose the foreign country or place of origin of a product or its components.

.....

3. All foreign origin matters within the jurisdiction of the Bureau of Customs 1/ shall be referred to it by the liaison officer 2/ unless he believes that the Bureau's remedy would be inadequate and that the matter meets the criteria of paragraphs 4 or 5 below.

.....

4. Country-of-origin matters involving affirmative misrepresentation of country of origin are to be treated like other deceptive practice matters.

.....

5. No action shall be taken in any matter involving non disclosure of country of origin unless there is a clear and compelling probability that substantial deception and public interest are involved.

A. Among the factors to be considered in evaluating the substantiality of the public interest are:

.....

- (3) The significance to the public of the deception.
- (4) Whether non disclosure of country of origin is an industry-wide practice, or respondent's non disclosure has caused substantial diversion of business from competitors.

B. In a matter involving a product as to which only a component is of undisclosed foreign origin, no action shall be taken unless such component:

- (1) Is a principal part or ingredient, or is a primary functional element, and
- (2) Is not promptly replaceable by one of like quality available in the United States.

C. In a matter involving non-disclosure of foreign origin in an advertisement, no action shall be taken unless ordered by the Commission.

D. Country-of-origin non-disclosure matters shall be accorded low priority.

.....

Obviously, the petitioners have not been afforded the procedural and evidentiary advantages that the Commission's present policy affords all of their competitors. It is submitted that the portion of the order

here under consideration is arbitrary and capricious and has the tendency and capacity to divert trade from petitioners to their competitors, who will be permitted under present policy to engage in practices prohibited petitioners.

This Court now has exclusive jurisdiction of this entire proceedings,⁴¹ and should either vacate the provision thereof numbered 2, relating to the individual petitioners, or remand for further proceeding in conformity with the present policy of the Commission.

Petitioners must be accorded the same commercial privileges and administrative protection that will be afforded their most favored competitors.

II. A NOVEL CONCEPT

But the proscription of the Order to which the argument is here addressed is challenged on principles of law rooted far more deeply than the ebb and flow of agency policy.

It should be noted that this portion of the Order does not merely require disclosure of the country of origin of imported watch components, it requires *significantly*, that it be disclosed "*expressly, clearly, conspicuously and prominently in immediate connection . . .*"⁴² with the use of the name "Waltham".

This may be construed to mean that wherever petitioners use their conceded valid trade name, they must, in conjunction therewith, set forth clearly and conspicuously the country of origin of each and every imported component of the product upon which the name is used. Apart from the sheer folly of such a requirement, the consuming public, like Jason and the Golden Fleece might spend an errant life time determining the nature,

⁴¹ 15 U.S.C.A. 45(d).

⁴² J.A. 116.

origin and source of a product they might otherwise have purchased by spontaneous association of good will with the trade name.

It is apparent that the impact of the Order is directed at the use of the name "Waltham" on imported watches or watches of imported components, and not at mere failure to disclose the origins of those watches and components.

Therefore, the Commission had to conclude as a matter of law that "Waltham" has a legal meaning or connotation which creates deception when it is used, sans qualification, on imported products.

Such a meaning or signification is novel and absolutely without precedent. In essence, the Commission is holding that "Waltham", apart from the secondary meaning which identifies it with the products sold by its owner, has acquired a kind of common acceptance by virtue of which it has come to mean that such products are made in U.S.A.

What evil would befall Ford and General Motors had the new policy of the Commission, above referred to, not interceded to protect their use of their names on products that are being assembled from components imported from half the Western World? It would appear that only the consumer will suffer if the retention of good will involved in an established trade name, is to be weighed against the economies inherent in importation of foreign components with a foreign marked bill-board as the epitaph swaying the balance or decision in favor of an unobliterated "Ford" or "Chevrolet" as opposed to a more economical product.

The Law of Trademarks is one cornerstone of the law of unfair competition: considerations arising out of the competitive relationship, therefore, should prevail over any claimed public right. Such a right cannot be invoked as a shield for the furtherance of unfair competition.⁴³

It is conceded that the Waltham Watch Company has acquired by

⁴³ Callman, Rudolph, "Unfair Competition and Trade Marks" (Callaghan, Chicago, 2nd Ed.) Vol. 3, page 1671.

succession the rights to the use of the trade-mark and trade name "Waltham" which had originally vested in a watch enterprise started by Aaron Dennison in 1849 in Waltham, Massachusetts.

The Commission's Order is predicated upon the theory that the unqualified use of the trade name "Waltham" and of truthful slogans concerning the product becomes deceptive when the product is composed of imported components.⁴⁴

It is submitted, that the Commission has given to "Waltham" the third meaning that is without precedent. In so doing, it is respectfully submitted, it has blasted away one of the cornerstones of the law of unfair competition by permitting a misconceived sense of public right to prevail over considerations arising out of the competitive relationship. It has invoked this false claim of public right as a shield for the furtherance of unfair competition.⁴⁵

The Order here being reviewed would require petitioners to clearly disclose the country of origin of each component of "Waltham" watches not entirely manufactured in the United States.

Admittedly, the owner of the trade-mark or trade name may not use, nor permit the use of such trade-mark or trade name in a manner designed to deceive the public. It is nevertheless respectfully submitted that the lawful owner's decision to use a validly acquired trade-mark or trade name on imported rather than domestic products is not a design for deception.

⁴⁴ For emphasis, it is here repeated that the original company (Massachusetts corporation) became an importer long before the Axlers in the succession of its management, used the slogans complained of below.

⁴⁵ Singer Mfg. Co. v. June Mfg. Co., 166 U.S. 169; 41 L. Ed. 118; 16 S. Ct. 1002 (1896) and see also: McLean v. Fleming, 96 U.S. 246; 24 L. Ed. 828 (1878).

In the *Singer* case⁴⁶ where the effect of a generic word was in issue, the Supreme Court said it did not follow that the general power vested in the public to use the name imports that there is duty imposed on the one using it to adopt such precautions as will protect the property of others and prevent injury to the public interest, if by doing so no substantial restriction is imposed on the right of freedom of use. This principle is elemental and applies to every form of right and is generally expressed by the aphorism *sic utere tuo ut alietum non laedas*.

The Commission relies upon the examiner's finding⁴⁷ that the sale of imported watches under the trade name "Waltham" is deceptive because the name (has) long (been) associated by the public with entirely American products, made in Waltham, Massachusetts!

It must do so because there is no evidence of deception and because the alleged false representations are true, unless when used in conjunction with the name Waltham on imported watches they become deceptive or false and misleading because that name has acquired a third meaning which identified it with products made in the U.S.A.

There is no precedent for such a proposition, none has been cited nor can any be inferred from the precedents relied upon below.

"Waltham" Does Not Mean "made in U.S.A."

It is a valuable property right now owned by the Waltham Watch Company of Delaware. (petitioners)

After the spin off the Massachusetts corporation changed its name to the Waltham Precision Instrument Company, Inc., which has been engaged in the precision instrument business (other than watches) in Waltham, Massachusetts. The Waltham Watch Company has been engaged in the manufacture, importation, distribution and sale of watches since the

⁴⁶ *Singer Mfg. Co. v. June Mfg Co.*, 163 U.S. 169; 41 L. Ed. 118, 16 S. Ct. 1002 (1896).

⁴⁷ J. A. 114, Findings 14, 15.

spin off and since the merger with Hallmark, Inc., its plant and principal place of business has been located in Chicago.⁴⁸

Petitioners own valid and subsisting trade-mark registrations of "Waltham" originally acquired by the old Massachusetts corporation. (See Appendices "D" & "E", this Brief.)

The proposition that a trade name can acquire a meaning which identified the products upon which it is used with American manufacture, must, we submit, be squarely confronted by this Court, unless that novel concept is to be judicially sanctioned.

III. SECONDARY MEANING

"Waltham" has acquired a secondary meaning which had been judicially recognized by 1899.⁴⁹ By that time it had acquired common acceptance by long and continuous use and had lost its primarily geographic significance.

In other words, though it originally had meant "watches made in Waltham, Massachusetts," by 1899 the court had come to recognize that it had lost that geographic significance and come to mean watches manufactured by the owner of the trade name. Had it not acquired this secondary meaning, it could not have become a trade name.

Now the Commission, by its Order, and in the proposition of law stated above as its basis, would restore the geographic significance which Waltham had lost by 1899. In fact, it would not only restore that geographic meaning, but broaden it from mere identification of a town in Massachusetts to mean "made in the United States" when used on watches. There is no precedent to support such a restoration, and the cases relied upon below are not authority for it.⁵⁰

⁴⁸ See "Statement Of The Case," *supra*.

⁴⁹ American Waltham Co. v. U. S. Watch Co., 173 Mass. 85; 52 N.E. 141 (1899).

⁵⁰ Edw. P. Paul & Co., Inc. v. Federal Trade Commission, 169 F. 2d 294 (C.A. D.C. 1948). Compare F.T.C. v. Walker's New River Mining Co., 79 F. 2d 457, 586, (C.C.A., 4, 1935)

Waltham, like all competitors, marks the country of origin under the numeral "6" on the face or dial of the imported watches in conformity with the requirements of the Bureau of Customs.⁵¹

Obviously, the Commission's Order singles out Waltham in a highly competitive industry and would unfairly and inequitably require it to "water down" its trade name, while competitors, whose acts and practices are identical, will continue to use their equally well established trade names without qualification or limitation.

The value of a trade name or trade-mark is vested in the right to use it for advertising and marketing purposes. It would appear that the Commission, having a mandate from the Congress to maintain fair competition, is here fostering unfair competition. Quære: If the Massachusetts Petitioner were to re-acquire the rights to the trade name, could it use it without qualification on imported movements in the same manner it did before licensing that use to Hallmark, Inc.?

**The Waltham Case Decided in 1899⁵² is Res Judicata
On The Issue Of Secondary Meaning, and the Order
Below In Conflict With That Decision.**

The Waltham Case is a landmark in the law of secondary meaning and discussed by every authority who has written in the field of trade names and trade-marks.

The defendant had begun the manufacture of watches in Waltham in bona fide. The problem which arose was stated by the late Mr. Justice Holmes, then presiding judge of the Massachusetts Court as follows:

It is desirable that the Plaintiff should not lose customers by reason of the public mistaking another manufacturer for it. It is desirable that the Defendant be free to manufacture watches at Waltham and to tell the world that it does so. The two desiderata cannot both be had to their full extent and we

⁵¹ CX 98C.

⁵² American Waltham Co. v. U.S. Watch Co., supra.

have to fix the boundaries as best we can (page 86 of that decision).

Confronted with this problem, the Court there decided that the predecessors of petitioners had made the name Waltham so widely known for watches that the primary trade meaning of the word "Waltham" in fact indicated the Plaintiff's article and not the geographical locality. Consequently, the Court deemed the name "Waltham" a valid common law trademark and enjoined the defendant absolutely from using Waltham in a trademark sense and in particular from advertising its watches as Waltham watches. But the Court went even further enjoining the defendant from a non-denominative use of the term by also forbidding it to state upon the dials of its watches that they were made in Waltham. The defendant was not even allowed to use the name Waltham, Massachusetts, on the inner plates of its watches without an accompanying statement clearly distinguishing its watches from those of the Plaintiff.⁵³

Geographical names having attained a controlling secondary meaning have been held valid regardless of the domicile of the producer. It is common knowledge, for instance, that a consumer buying "Paris" garters,⁵⁴ "Philadelphia Cheese,"⁵⁵ etc., does not believe or understand that the product he is buying emanates from the geographical place captured in the trade name.

In the "Phillies" cigar case⁵⁶ the right to use the word "Phillies" in the tradename was upheld even though the evidence established that as far back as 1932 many of the company's cigar were manufactured in New Jersey.⁵⁷

⁵³ Derenberg, Walter, "Trade Mark Protection and Unfair Trading," Matthew Bender, Albany, N.Y., 1936, page 341.

⁵⁴ A. Stein & Co. v. Liberty Garter Co., 198 F. 959 (D.C.S.D.N.Y. 1912)

⁵⁵ Intl. Cheese Co. v. Phoenix Cheese Co., 103 N.Y.S. 362 (1907).

⁵⁶ Bayuk Cigars v. Schwartz, 1 F. Supp. 286 (D.C.N.J. 1932)

⁵⁷ See also: Anheuser-Busch v. Budweiser Malt Products Co., 295 F. 306 (C.C. A. 2, 1923); Hyde Park Clothes, Inc. v. Hyde Park Fashions, Inc., 204 F. 2d 223 (C.C.A. 2, 1953).

It is also well settled that the right to protection of a geographical name that has acquired secondary meaning, "is not lost because the one using it moves his plant to a place which does not bear the name which has thus been used as a trade name..."⁵⁸

IV. THE EFFECT OF WALTHAM'S MOVE TO CHICAGO FROM MASSACHUSETTS

Since it may be conceded that Petitioners could have escaped the bondage of the negative limitation or positive disclaimer required by this Order had they remained in Massachusetts after acquiring control of the company, the Court must inquire into the significance of the move to Chicago.

The Commission has never challenged the validity of the present ("spin off") company's title to the trade name and trade-mark "Waltham". However, by virtue of its order, it does challenge the right to use those properties in Chicago in the same manner they could have been used had economic or other considerations advised management to remain in Waltham and import as the Massachusetts corporation had prior to the Hallmark license.

Petitioners respectfully submit that the Commission in so doing completely ignores the wealth of law controlling this question.

The prominent trade-mark authority, Harry D. Nims, has treated this subject at some length:⁵⁹

The right to protection of a geographical name used to indicate source, is not lost because the one using it moves his plant to a place which does not bear the name which has thus been used as a trade name. This is not a reason why he may not continue to claim protection in the use of the name of the place where formerly he was located, if prior to

⁵⁸ Nims, Harry D., "Unfair Competition and Trade Marks, (Baker, Voorhis & Co., Inc., N.Y., 4th Ed. 1947). Vol. 1, page 318.

⁵⁹ Supra.

the time of his removal he has acquired a secondary meaning as used by him. (*Badlin v. Cusenier*, 221 U.S. 580, 31 Supreme Court 669(1910).)

In *Siegert v. Gandolfi*,⁶⁰ it is stated that:

If the geographical name has become a secondary designation indicative of the product of the particular manufacturer, it is as much entitled to protection as any arbitrary or fancy name which he might have selected; and the circumstances that the manufacturer might have removed his place of business and is making his product in some other place is of no more consequence that it would be if he had adopted the fancy name.

There, complainants were the successors of the original manufacturer of "Siegert's Angostura Bitters" with which the name "Angostura" had long been identified. This was the name of a city in Venezuela where the bitters were first made though the factory had long since been transferred to Trinidad. Defendants made bitters of a similar kind in Baltimore, and sold them as "Angostura" Bitters imitating at the same time complainant's bottles and labels, but correctly stating in the labels and circulars their own name and the place of manufacture. However, the word "Angostura" had acquired a secondary meaning and was not open to the use of defendants and these rights were not lost by the removal.

The law appears settled. The right to use a valid geographic trade-name which has acquired secondary meaning is vested in the owner of that trade name irrespective of the status of the business, once the right to use is acquired.

The proposition underlying the Order here would require all name brand manufacturers to either discontinue the importation of foreign components and products (contrary to economic public policy), or to label the ultimate product like a bill-board, disclosing the foreign origin of each imported component. There is no basis in law to support that proposition.

⁶⁰ *Siegert v. Gandolfi*, 149 F. 100 (C.C.A. 2, 1906).

A trade name once acquired cannot, as the Commission contends, pass into the public domain. The property right vests, rather, in the owner of the trade name. It identifies the product with the owner and becomes a property which is subject to the owner's control. The public has no vested interest in the exercise of control over private property of this nature any more than it does over general rights in and to personal property.

"Waltham" having acquired a secondary meaning by 1899 has come to mean watches made by the owner of that tradename. Petitioner, Waltham Watch Company, has by succession acquired such right and owns the name.⁶¹

Numbered paragraph 2 of the portion of the Order addressed to the individual respondents is therefore arbitrary and capricious and contrary to law and should be reversed.

V. PRETICKETING AND PRICING

The Order, as here pertinent, is addressed to all petitioners and requires them to cease and desist "Advertising, disseminating or distributing any list, preticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondent's trade area."⁶²

Paragraph three of the Complaint⁶³ had charged petitioners with "engaging in the practice of attaching or causing to be attached price tickets to their said products upon which certain amounts are printed. . . also disseminated. . . price lists, catalogues, catalogue insert sheets, . . . and other forms of advertising in which certain amounts are shown

⁶¹ See: Gebbie v. Stitt, 82 Hun. (N.Y.) 93; 31 N.Y. Supp. 102. Compare El Moro Cigar Co. v. F.T.C., 107 F. 2d 429 (C.C.A. 4, 1939). See also: ex parte Fils de R. Picard, et Cie, 9 U.S.P.Q. 208 (Comm. of Patents, 1931) and Hazel Bishop, Inc. v. Perfemme, Inc., 137 U.S.P.Q. 4 at page 5; C.C.A. 2 decided March 1, 1960, case No. 235.

⁶² J.A. 125.

⁶³ J.A. 2.

as the retail prices . . . (they) thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth, "watches are usually and customarily sold at retail and are fictitious retail prices."

Among others, the examiner in his Initial Decision had entered Findings 8 and 9, as follows:⁶⁴

8. Respondents represent directly or indirectly by such materials that the amounts shown are the usual and regular retail prices.

9. In truth and in fact the prices on the tickets and in the materials mentioned are in excess of the prices at which said watches usually and customarily are sold at retail prices.

But the Commission substituted its own findings for those above quoted:⁶⁵

8. Respondents represent directly or indirectly by such materials that the amounts shown have been established in good faith as an honest estimate of actual retail prices which do not appreciably exceed the highest prices at which substantial sales of their watches are made in their trade territory.

9. In truth and in fact respondents know that the retail prices set forth on catalog sheets and tickets attached or accompanying watches furnished by them to catalog house customers are appreciably in excess of the highest price at which substantial sales made in their trade area by those customers, thus the retail prices are not disseminated in good faith as an honest estimate of the actual retail selling price of catalog house customers, this practice is dealt with in Guide III of the Commission's revised "Guides Against Deceptive Pricing"

Apart from the absolute absence in the record below of any evidence of knowledge, honest estimate, good faith or trading area, how

⁶⁴ J.A. 113.

⁶⁵ J.A. 123.

can the petitioners ever comply with the provisions of the Order based upon those elusive findings?

They are, of course, based on the Commission's "Guides Against Deceptive Pricing" (See Appendix "F", this Brief) which were promulgated January 8, 1964, or a little more than one month before the Order was entered, but nearly two years after the hearings had ended.⁶⁶ No evidence from which inferences can be drawn in favor of the substituted findings, nor the conclusions of the Order based thereon, appears in the entire record below.

The Order can not stand unsupported by any evidence and the cause should be remanded for further proceedings for the purpose of receiving evidence based upon intent, knowledge, good faith, honest estimate and the trading area.

But, this Court may well consider reversing the Order and dismissing Paragraph Three of the Complaint if the Guides upon which the Order is based are being applied retroactively by the Commission. If Petitioners had the Guides to inform them, they might well have introduced evidence to support the position that their practice is in conformity to the Guides. The retroactive application of standards such as there is, we submit, arbitrary, capricious and constitutes a denial of administrative due process of law.

The Commission decided three similar cases at or about the same time that it entered the Order that is here under review.⁶⁷

Two of those cases were disposed of by Orders similar to that under discussion, the third was dismissed.

The *Gruen* and *Benrus* cases are being reviewed in other Circuits. (*Benrus* in the 8th Circuit.)

⁶⁶ The Initial Decision is dated November 19, 1962, J.A. 122.

⁶⁷ *Benrus Watch Co., et al.*, matter of, F.T.C. Docket 7352, (Elman dissenting); *Gruen Industries Inc., et al.*, matter of, F.T.C. Docket 8455 (MacIntyre dissenting); *Bulova Watch Co., Inc., et al.*, matter of, F.T.C., Docket 7593 (MacIntyre not participating).

In dismissing the *Bulova* case, the Commission reversed the Initial Decision of one of its Examiners, finding no evidence to support an Order under its new "Guides". The Opinion of the Commissioner in *Bulova* is included *infra* as Appendix "I", this Brief.

One of the Commissioners would not concur in the *Benrus* decision, yet wrote the Opinion in the *Gruen* case. (see Appendices "J" & "K," this Brief) Another of the Commissioners participated and apparently agreed with the majority in this (*Waltham*) case and in the *Benrus* case, but did not concur in *Gruen* and did not participate in *Bulova*.

An analysis of the Opinions and Orders in the four cases (all of which are printed *infra* Appendices "I" & "K", this Brief, and J.A. 123-125 for the Order in this case) is confusing in that the evidence discussed in each is essentially the same, yet various members of the Commission appear to disagree not only with the majority in specific cases, but with themselves from case to case.

The confusion is heightened by the recent Order in *Clinton*⁶⁸ and the Statement of Commissioner MacIntyre in *Regina*⁶⁹ (*infra*, Appendices "M" & "L", respectively, this Brief)

It is notable that one of the Commissioners did not concur in Commission Order modifying outstanding Order in those two cases and that he entered "Statements" annexed to the modification orders in each of the cases. (also annexed to Appendices "M" & "L" *infra*)

This same Commissioner did not concur with *denial* of a petition to modify a similar Order in still another case.⁷⁰

(*infra*, Appendix "N", this Brief) and at the time the "Guides" were

⁶⁸ *Clinton Watch Co., et al.*, matter of, F.T.C. Docket 7434 (Order on Petition to Reopen Proceeding and Statement of Commissioner MacIntyre).

⁶⁹ *Regina Corporation*, matter of, F.T.C. Docket 8323 (On Petition to Modify - Statement of Commissioner MacIntyre).

⁷⁰ *Art National Mfg. Dist. Co., Inc., et al.*; matter of, F.T.C. Docket 7286, Order Denying Petition to Modify, dated May 8, 1964.

released by the Commission, entered his separate statement (*infra*, Appendix "O", this Brief) declaring his opposition to the "Guides".

In light of the evident confusion of the Commission itself with reference to its newly promulgated "Guides Against Deceptive Pricing", what magic formula will petitioners need devise in order to effectively comply with rule of practice incorporated into the Order that one of the Commissioners applies differently from case to case on the same essential facts while another steadfastly refuses to acknowledge their validity?

It is submitted therefore, that the portion of the Order addressed to all petitioners in numbered paragraph 1 is arbitrary and capricious, utterly confusing, denies administrative due process in its retroactive application of standards not in existence at the time the Complaint issued, and that Paragraph Three of the Complaint should be dismissed.

VI. JEWELS

Paragraphs Five and Six of the Complaint⁷¹ allege that petitioners purchase "17 jewel watch movements made in and imported from Switzerland, add a device containing 4 or 8 synthetic jewels, and affix attachments to the watches and case the movements. The watches are then represented as "21" and "25" jewel watches, . . . (thus) represented that said watches contained 21 and 25 jewels, each of which serves a mechanical purpose as a frictional bearing, and that, each jewel provides a mechanical contact at a point of wear. In fact, the jewels in the device . . . are not functional and these watches are not 21 and 25 jewel watches as represented and advertised."

As noted in the "Statement of the Case", *supra*, petitioners stipulated that facts as alleged were true but reserved the right to challenge any Order as a matter of law which in terms adopted the pleaded definition of a watch jewel.

⁷¹ J.A. 3.

In this regard, it is petitioners' position that (1) all jewels in watches form parts of bearings; (2) all jewels in watches are synthetic; (3) a jewel to be represented as such and designated as such in a watch movement must be functional; (4) the pleaded definition is antiquated and inconsistent with the advance in the prior jewel bearing art, represented by the grant of patents to the inventor of the device (Resevoil) which is conceded to be that used by the petitioners as alleged in the Complaint; and (5) has been supplanted by the Court's definition of a watch jewel in an earlier case involving an earlier patent of a similar device; (6) that the jewels in the device here fall within the Court's definition and petitioners' representation and accordingly are neither deceptive nor misleading.

In addition, it should be noted here that the portion of the Order to which their argument is addressed is inconsistent with the charge of the Complaint and, in reality, incorporates into its proscription part of the old definition as pleaded in the Complaint, and, in part, adopts the definition established by this Court in the *Tornek* case. (*supra*)

As is here pertinent, the Order provides that the individual petitioners cease and desist⁷²

Representing . . . that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which *serves a purpose of protecting against wear from friction* by providing a mechanical contact with a moving part at a point of wear. (Emphasis supplied)

In *Tornek*, this Court, upon review of a Commission Order involving another Resevoil patent reflected its review of that record by stating the following definition of a watch jewel, with which petitioners concur:

⁷² J.A. 124.

⁷³ *Tornek v. F.T.C.*; *supra*.

Examination of the testimony before the Federal Trade Commission shows clearly that in the 21 jewel watches sold by others in the trade, there are no jewels that do not serve *either a function of bearing or a function of preventing against wear from friction.* (Emphasis supplied)

As will be noted from a close scrutiny of (1), the definition pleaded in Paragraph Six of the Complaint⁷⁴, (2) the definition incorporated in the Order here pertinent⁷⁵ and (3) the quoted definition from the Court's definition as set forth in the *Tornek* case (*supra*), the Commission has here abandoned the ill-founded concept of a mechanical purpose as a frictional bearing (as pleaded), adopted one of the two alternative functions adopted by this Court (protect against wear from friction), and combined it with the remaining portion of the pleaded definition so as to corrupt the judicial expression into a meaning not intended by this Court.

Obviously, this Court in *Tornek* would have simply stated that a jewel must protect against wear from friction by providing a mechanical contact at a point of wear had it concluded it to be a sufficient statement of the definition of a jewel. However, the Court, having reviewed that record at length, determined otherwise, and stated that a jewel must either protect against wear from friction or serve the function of a bearing - but must not serve both of these functions as the Order here requires.

Indeed, since the evidence stipulated justifies that Resevoil jewels such as petitioners here are alleged to have used and concede that they did, do, as integral components of jewel bearing assemblies into which they are incorporated upon "affixing the device", perform the function of protecting against wear from friction. They do so by adding life-giving lubrication to the bearings to which they are assembled and all experts agree that the lubrication function is the principal feature performed by

⁷⁴ J.A. 3.

⁷⁵ J.A. 124.

all jewels in all watches.

But apart from such evidence,⁷⁶ it must be conceded that the patent upon which the jeweled device affixed to 17 jewel movements, as alleged, are *prima facie* evidence of the utility of the invention and its advance in the prior art.⁷⁷

Since the presumption is not rebutted in this record, the Fichter patents must protect the Fichter invention of a functional device known as Resevoil, which the patents themselves establish as an advance in the prior art of jewel bearings.

It is submitted that numbered paragraph 1 of the portion of the Order addressed to the individual petitioners is arbitrary and capricious and contrary to law. It should be reversed and paragraphs Five and Six of the Complaint dismissed by this Court in the exercise of its exclusive jurisdiction.

GUARANTEES

The Order, as here relevant, would require all petitioners to cease and desist representing that their merchandise is guaranteed, "unless the nature, extent and conditions of the guarantee, and the manner in which the guarantors will perform thereunder are clearly set forth in connection with the representation of guarantee."⁷⁸

Among other guarantee certificates in evidence, the Court's attention is invited to Commission Exhibit 23 A-D. It does, we submit, conform to the requirements of the Order, as quoted, and accordingly, the Order is not supported by the evidence and numbered paragraph 2 of the portion thereof addressed to all petitioners should be reversed, and Paragraph Four of the Complaint should be dismissed.⁷⁹

⁷⁶ Which is incorporated into the record below by the Stipulations referred to in the "Statement of the Case", *supra*, and not physically a part of the record here.

⁷⁷ 35 U.S.C.A. 101, 102, 282.

⁷⁸ J.A. 125.

⁷⁹ J.A. 2-3. For evidence of the petitioners' policy in connection with service and repair pursuant to the guarantee see J.A. 64.

CONCLUSIONS

Wherefore, the premises considered, petitioners pray that this Court:

1. Reverse numbered paragraph 2 of the portion of the Order addressed to the individual petitioners and dismiss Paragraphs Seven and Eight of the Complaint, or that the cause be remanded for proceedings in conformity with present Agency policy.

2. Reverse the Order, numbered paragraph 1, as addressed to all petitioners, and dismiss Paragraphs Three of the Complaint, or, in the alternative, remand the case for further proceedings with reference to Findings 8 and 9 of the Commission.

3. Reverse the portion of the Order addressed to the individual petitioners in numbered paragraph 1, and dismiss Paragraphs Five and Six of the Complaint.

4. Reverse the portion of the Order addressed to all petitioners in numbered paragraph 2 and dismiss Paragraph Four of the Complaint.

Respectfully submitted,

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Of Counsel:

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October 28, 1964.

APPENDIX TO BRIEF

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

In the Matter of:

WALTHAM WATCH COMPANY,
a corporation, and
HARRY ARONSON, BEN COLE, and
MORRIS DRAFT,
individually and as officers of said
corporation

Petitioners

vs.

FEDERAL TRADE COMMISSION

Respondent

PETITION FOR REVIEW

JURISDICTION

The jurisdiction of this Court is founded upon Section Five (d) (e) of the Federal Trade Commission Act; 15 U.S.C.A. 45 (d) (e); 38 Stat. 719, Act of September 26, 1914 (as amended).

VENUE

Petitioners here, respondent below, at all times here material, engaged in the acts and practices involved in these proceedings in the District of Columbia.

STATEMENT OF PROCEEDINGS TO BE REVIEWED

The Final Order of the FTC in the proceedings below identified as Commission Docket 8396 issued February 28, 1964. A copy of that Order is annexed hereto as Exhibit A.

APPENDIX A

Page 2 of 4

The Final Order of the Commission was served by letter dated March 25, 1964, a copy of which is annexed hereto as Exhibit B.

That Final Order requires the Petitioners here to cease and desist from certain trade practices involved in the proceedings before the agency instituted by Complaint issued on May 15, 1961.

The Complaint alleged certain specific violations of Section Five of the FTC Act¹ and the Hearing Examiner in his Initial decision issued October 18, 1962, found that the respondents below, petitioners here, had engaged in certain unfair trade practices and specifically that they had fictitiously misrepresented the prices at which their products are sold by affixing thereto price tags in excess of the prices at which products were usually and regularly sold at retail.

In addition, it was found by the Commission that the petitioner here misrepresented guarantees and that by use of certain advertising slogans they misrepresented the source of manufacture of the products, the jewel content of watches, and the country of origin of components not entirely manufactured in the United States.

GROUND'S UPON WHICH RELIEF IS SOUGHT

1. The Final Order of the Commission modified the Examiner's Initial decision by striking therefrom certain findings. That Order substituted Commission findings for those of the Examiner (findings 8 and 9).

There is no evidence to support findings 9 of the Commission and the evidence establishes that petitioners represented the prices of their products in good faith based upon an honest estimate of the highest prices at which substantial sales of their products are made in the trading area in which such prices are represented.

2. The Order of the Commission modifying the Order of the Examiner contained in his Initial decision is contrary to law, arbitrary and capricious.

¹ 15 U.S.C.A. 45(a).

3. The Order of the Commission is not supported by the evidence and is arbitrary and capricious.

4. The Order of the Commission was entered arbitrarily and against due process of law by a Commissioner of the FTC who was not a member of the FTC at the time the appeal to the Commission was argued.

5. Petitioners honestly represent the jewel content of their watches and each and every jewel represented to be a jewel serves a useful function in a watch.

6. The petitioners, as the owner of the tradename "Waltham", cannot be denied their right to use their property in the tradename "Waltham" by an Order of the Commission requiring qualification of that tradename when used in conjunction with products composed in part of components of foreign origin. Such an Order constitutes a denial of due process of law.

7. Slogans and representations containing slogans such as "Timing the Nation Since 1850", etc., as used by petitioners do not constitute misrepresentations and the Order in denying petitioners their right to use such slogans is arbitrary and capricious, constituting a denial of due process of law.

8. The Order is arbitrary and capricious in that it would require the petitioners to cease and desist from current marketing practices with respect to pre-ticketing and pricing, although there is no evidence upon which the "scienter" included as a necessary ingredient of the Order can be based.

9. The prohibition of the Order against the petitioners use of their guarantee is arbitrary and capricious and constitutes a denial of due process of law.

APPENDIX A

Page 4 of 4

PRAYER

WHEREFORE the premises considered, petitioners pray that the Order of the Commission issued February 28, 1964, in its docket 8396 be reversed and that the cause be remanded for further hearings; or that this Court substitute its Order dismissing its Complaint for that of the Commission; or that the Order be modified in conformity with law and the evidence of record in the case below.

Respectfully submitted,

B. Paul Noble
Attorney for Petitioners

Certificate of Service

I certify that on this 25th day of May, 1964, I mailed, first class, postage prepaid, two copies of this Petition for Review, to Joseph Shea, Secretary, Federal Trade Commission, Washington 25, D. C.

B. Paul Noble

OF COUNSEL:

HUGHES, DUFF & NOBLE
2022 R Street, N. W.
Washington, D. C. 20009
387-3292

Filed: May 25, 1964

[Rec'd -July 1, 1964]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,647

September Term, 1963

Waltham Watch Company,
a corporation, et al,

v.

Federal Trade Commission

Before: Danaher, Acting Chief Judge, in Chambers.

ORDER

On consideration of the joint motion of the parties as to times for filing designations of record, briefs and joint appendix, and it having appeared that the additional time sought is necessary because counsel for the Commission in this review are not the attorneys who supported the complaint in the proceeding before the Commission, and, therefore have no prior familiarity with the record. Counsel for petitioners is leaving the country in July, 1964, and will not return until sometime in September, 1964. In addition, the Commission is required by law to have its brief printed by the Government Printing Office, which requires seven days from delivery of the copy until return of the printed brief.

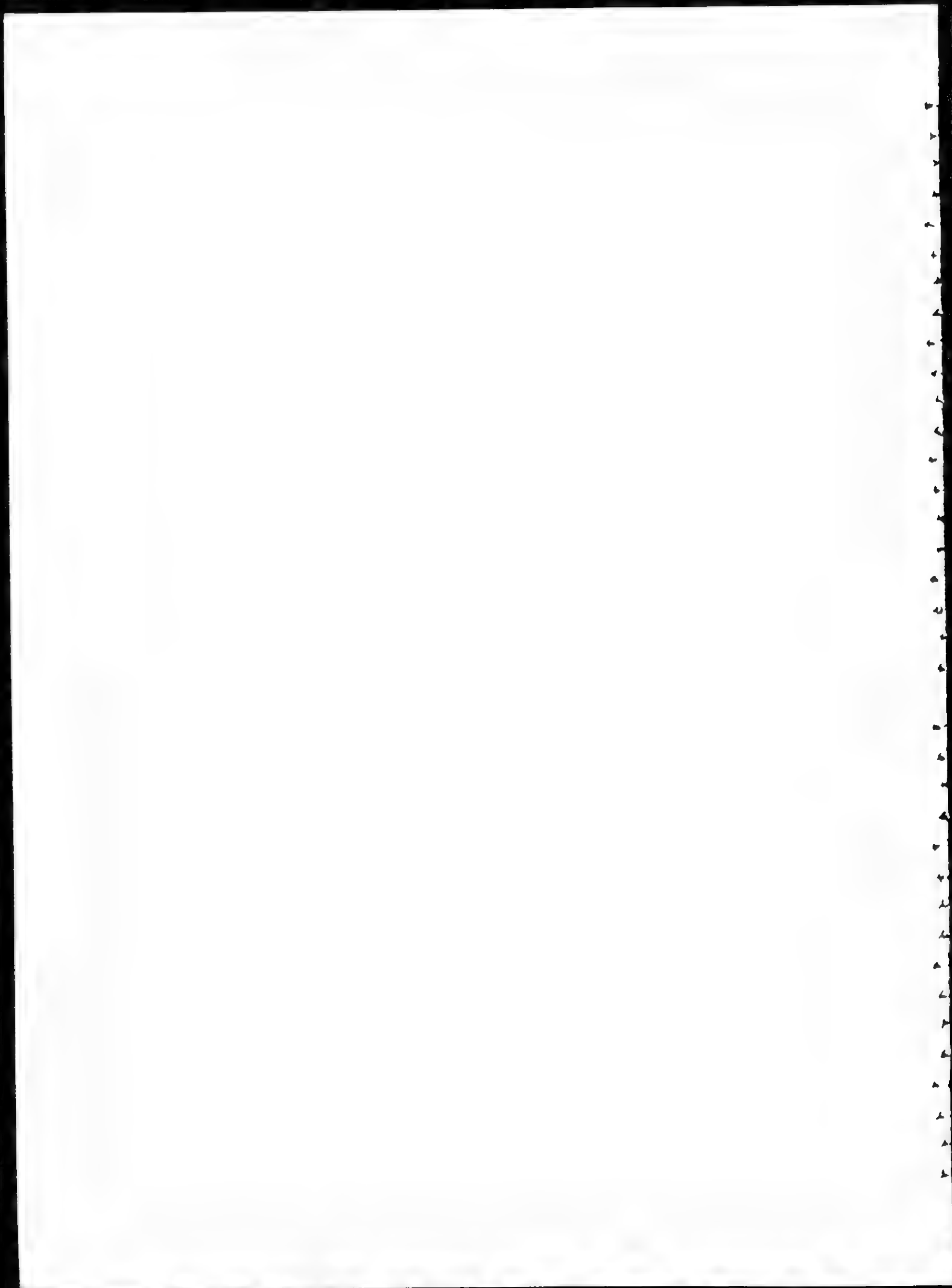
ORDERED that the motion be granted, and the times for filing the briefs and joint appendix is fixed as follows:

Petitioner's brief shall be filed on or before October 15, 1964.

Respondent's brief and the joint appendix shall be filed on or before November 16, 1964.

No extensions of time for filing the briefs of the parties will be granted.

Dated: June 30, 1964



[Filed Oct. 26, 1964]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,647

September Term, 1964

Waltham Watch Company,
a corporation, et al,

v.

Federal Trade Commission

Before: Bazelon, Chief Judge, in Chambers.

ORDER

On consideration of petitioners' motion to amend prehearing order, it is

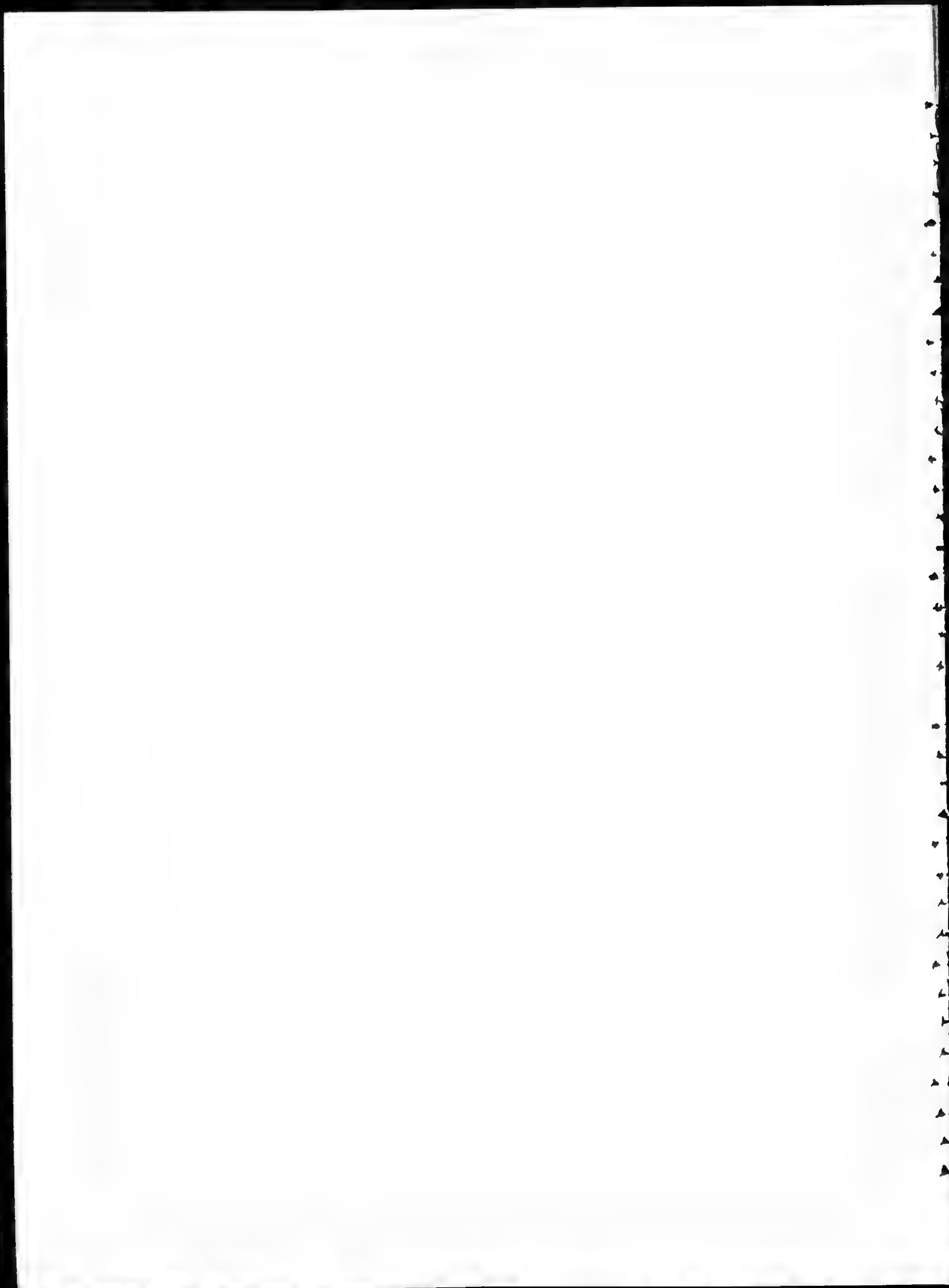
ORDERED that the time for filing the briefs of the parties is fixed as follows:

Petitioners' brief shall be filed on or before October 28, 1964.

Respondent's brief and the joint appendix of the parties shall be filed on or before November 25, 1964.

No further extensions of time for filing the briefs of the parties will be granted.

Dated: October 26, 1964



Renewed to
Waltham Watch Company, a corporation of Massachusetts.
UNITED STATES PATENT OFFICE.

WALTHAM WATCH COMPANY,
OF WALTHAM AND BOSTON, MASSACHUSETTS.

TRADE-MARK FOR WATCHES, CLOCKS OF ALL DESCRIPTIONS
AND FOR ALL PURPOSES, MARINE CHRONOMETERS,
BOX-CHRONOMETERS, AND STOP-WATCHES.

99,132.

Registered Aug 18, 1914.

Application filed November 24, 1963. Serial No. 74,179.

S T A T E M E N T.

To all whom it may concern:

Be it known that the WALTHAM WATCH COMPANY, a corporation duly organized under the laws of the State of Massachusetts, located and doing business at Waltham and Boston, counties of Middlesex and Suffolk, in said State, has adopted for its use the trade-mark shown in the accompanying drawing, for watches, clocks of all descriptions and for all purposes, marine chronometers, box-chronometers, and stop-watches, in Class 27, Horological instruments.

The trade-mark has been continuously used in the business of the applicant, who is also the owner of the registered trade marks American Waltham Watch Co., #13730, Oct. 12, 1866; American Waltham Watch Co., 16679, June 4, 1889; American Waltham Watch Co., 22859, April 25, 1893; American Waltham Watch Co., 22276, Jan. 3, 1893; Waltham Watch Co., 82124, May 30, 1911; Waltham Watch Co., 86188, April 16, 1912, since Dec. 1st, 1859.

APPENDIX D

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The said trade-mark is usually applied or affixed to the goods by stamping, impressing or engraving same to the plate or plates, or to the dials of the watches, etc., and to labels, and in other customary ways.

WALTHAM WATCH COMPANY,
By **HARRY L. BROWN,**
Treasurer.

WALTHAM
DECLARATION.

State of Massachusetts, county of Middlesex, ss.:

HARRY L. BROWN, being duly sworn, deposes and says: that he is treasurer of **WALTHAM WATCH COMPANY**, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes the above-named applicant to be the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in such near resemblance thereto as might be calculated to deceive; that such trade-mark is used by applicant in commerce among the several States of the United States; that the drawing presented truly represents the trade-mark sought to be registered, and that the specimens show the trade-mark as actually used upon the goods; that the mark has been in actual use as a trade-mark of the applicant **WALTHAM WATCH COMPANY** for more than ten years next preceding February 20th, 1905, and that to the best of deponent's knowledge and belief such use has been exclusive.

HARRY L. BROWN.

Subscribed and sworn to before me this 19 day of May, 1914.

[L.S.]

EUGENE L. FOLSOM,
Notary Public.

Renewed May 30, 1951, to Waltham Watch Company,
Waltham, Mass., a corporation of Massachusetts.

R E N E W E D
UNITED STATES PATENT OFFICE.

WALTHAM WATCH COMPANY,
OF WALTHAM, MASSACHUETTS.

TRADE-MARK FOR WATCHES, WATCHCASES,
WATCH-MOVEMENTS, AND PARTS THEREOF.

82,124.

Registered May 30, 1911.

Statement and Declaration.

Application filed November 30, 1910. Serial No. 53,036.

STATEMENT.

To all whom it may concern:

Be it known that the WALTHAM WATCH COMPANY, a corporation duly organized under the laws of the State of Massachusetts, located in Waltham, county of Middlesex, and State of Massachusetts, and doing business in said city, has adopted and used the trade-mark shown in the accompanying drawing, for watches, watchcases, watch-movements, and parts thereof, in Class No. 27, Horological instruments.

The trade-mark has been continuously used in the business of said corporation since September 6, 1886.

The trade-mark is engraved or otherwise directly applied to the goods, and the trade-mark is also applied or affixed to the packages containing the goods by placing thereon a printed label on which the trade-mark is shown.

WALTHAM WATCH COMPANY,
By HARRY L. BROWN,
Vice-Treasurer.

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DECLARATION.

State of Massachusetts county of Suffolk, ss.:

HARRY L. BROWN, being duly sworn, deposes and says that he is the vice-treasurer of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States, and between the United States and foreign nations or Indian tribes, and particularly with all foreign nations; that the drawing presented truly represents the mark sought to be registered; that the fac-similes show the mark as actually used upon the goods; and that the mark has been in actual use as a trade-mark of the applicant and applicant's predecessors from whom title was derived for ten years next preceding the passage of the act of February 20, 1905; and that, to the best of his knowledge and belief, such use has been exclusive.

HARRY L. BROWN.

Subscribed and sworn to before me, a notary public, this 22nd day of November 1910.

[L.S.]

EDWARD MARSH,
Notary Public

TRADE-MARK

WALTHAM WATCH COMPANY.

WATCHES, WATCHCASES, WATCH MOVEMENTS, AND PARTS THEREOF.

APPLICATION FILED NOV. 22, 1910.

82,124.

Registered May 30, 1911.

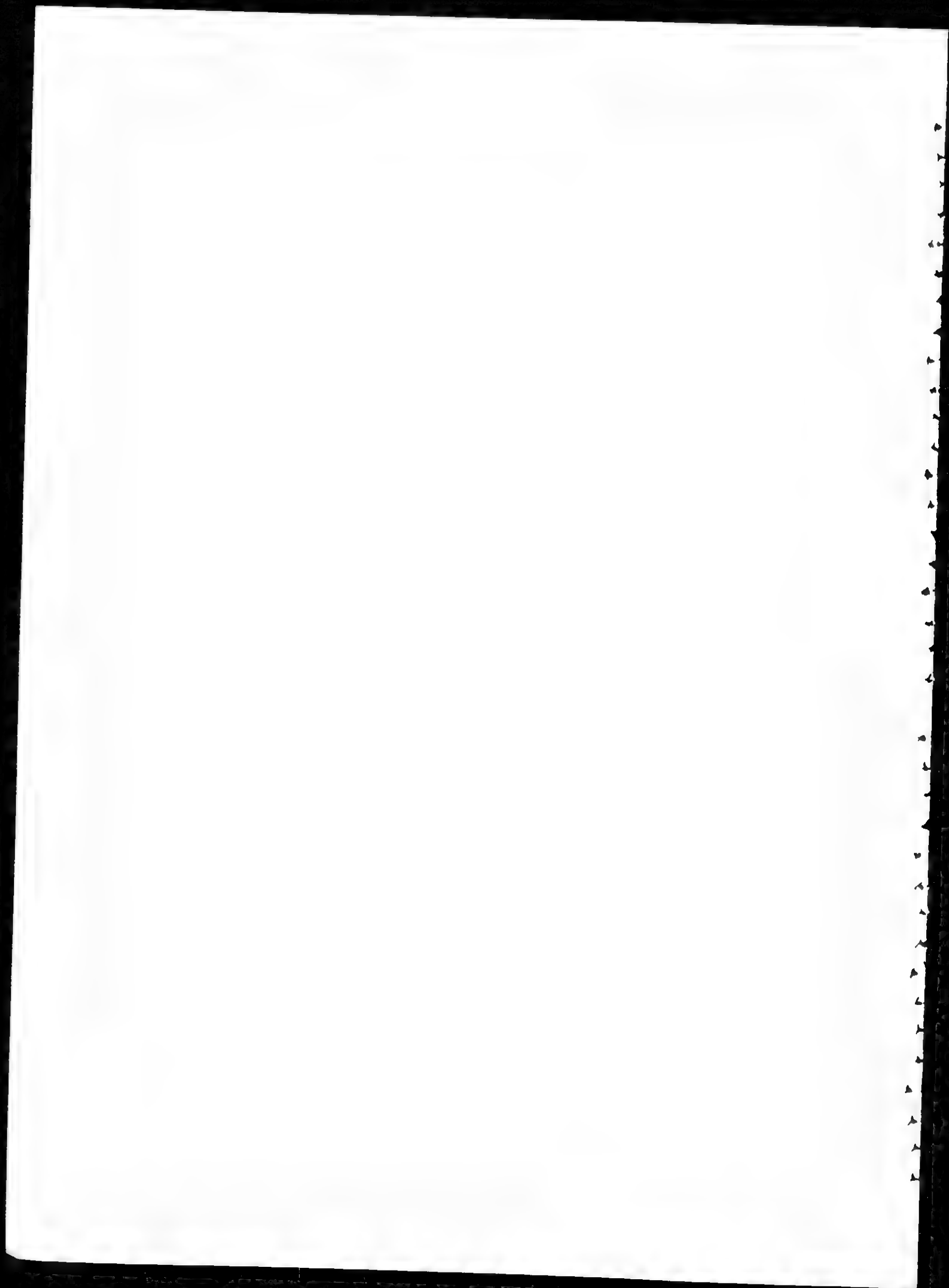
WALTHAM

PROPRIETOR

Waltham Watch Company

W. H. Hammett Co.

ATTORNEYS



FEDERAL TRADE COMMISSION
Washington
GUIDES AGAINST DECEPTIVE PRICING
Effective January 8, 1964.

* * * * *

GUIDE III - ADVERTISING RETAIL PRICES WHICH HAVE BEEN
ESTABLISHED OR SUGGESTED BY MANUFACTURERS
(OR OTHER NON-RETAIL DISTRIBUTORS).

Many members of the purchasing public believe that a manufacturer's list price, or suggested retail price, is the price at which an article is generally sold. Therefore, if a reduction from this price is advertised, many people will believe that they are being offered a genuine bargain. To the extent that list or suggested retail prices do not in fact correspond to prices at which a substantial number of sales of the article in question are made, the advertisement of a reduction may mislead the consumer.

There are many methods by which manufacturers' suggested retail or list prices are advertised: large scale (often nation-wide) mass-media advertising by the manufacturer himself; pre-ticketing by the manufacturer; direct mail advertising; distribution of promotional material or price lists designed for display to the public. The mechanics used are not of the essence. These Guides are concerned with any means employed for placing such prices before the consuming public.

There would be little problem of deception in this area if all products were invariably sold at the retail price set by the manufacturer. However, the widespread failure to observe manufacturers' suggested or list prices, and the advent of retail discounting on a wide scale, have seriously undermined the dependability of list prices as indicators of the exact prices at which articles are in fact generally sold at retail. Changing competitive conditions have created a more acute problem of deception than may have existed previously. Today, only in the rare cases are all sales of an article at the manufacturer's suggested retail or list price.

APPENDIX F

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But this does not mean that all list prices are fictitious and all offers of reductions from list, therefore, deceptive. Typically, a list price is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.

This general principle applies whether the advertiser is a national or regional manufacturer (or other non-retail distributor), a mail-order or catalog distributor who deals directly with the consuming public, or a local retailer. But certain differences in the responsibility of these various types of businessmen should be noted. A retailer competing in a local area has at least a general knowledge of the prices being charged in his area. Therefore, before advertising a manufacturer's list price as a basis for comparison with his own lower price, the retailer should ascertain whether the list price is in fact the price regularly charged by principal outlets in his area.

In other words, a retailer who advertises a manufacturer's or distributor's suggested retail price should be careful to avoid creating a false impression that he is offering a reduction from the price at which the product is generally sold in his trade area. If a number of the principal retail outlets in the area are regularly engaged in making sales at the manufacturer's suggested price, that price may be used in advertising by one who is selling at a lower price. If, however, the list price is being followed only by, for example, small suburban stores, house-to-house canvassers, and credit houses, accounting for only an insubstantial volume of sales in the area, advertising of the list price would be deceptive.

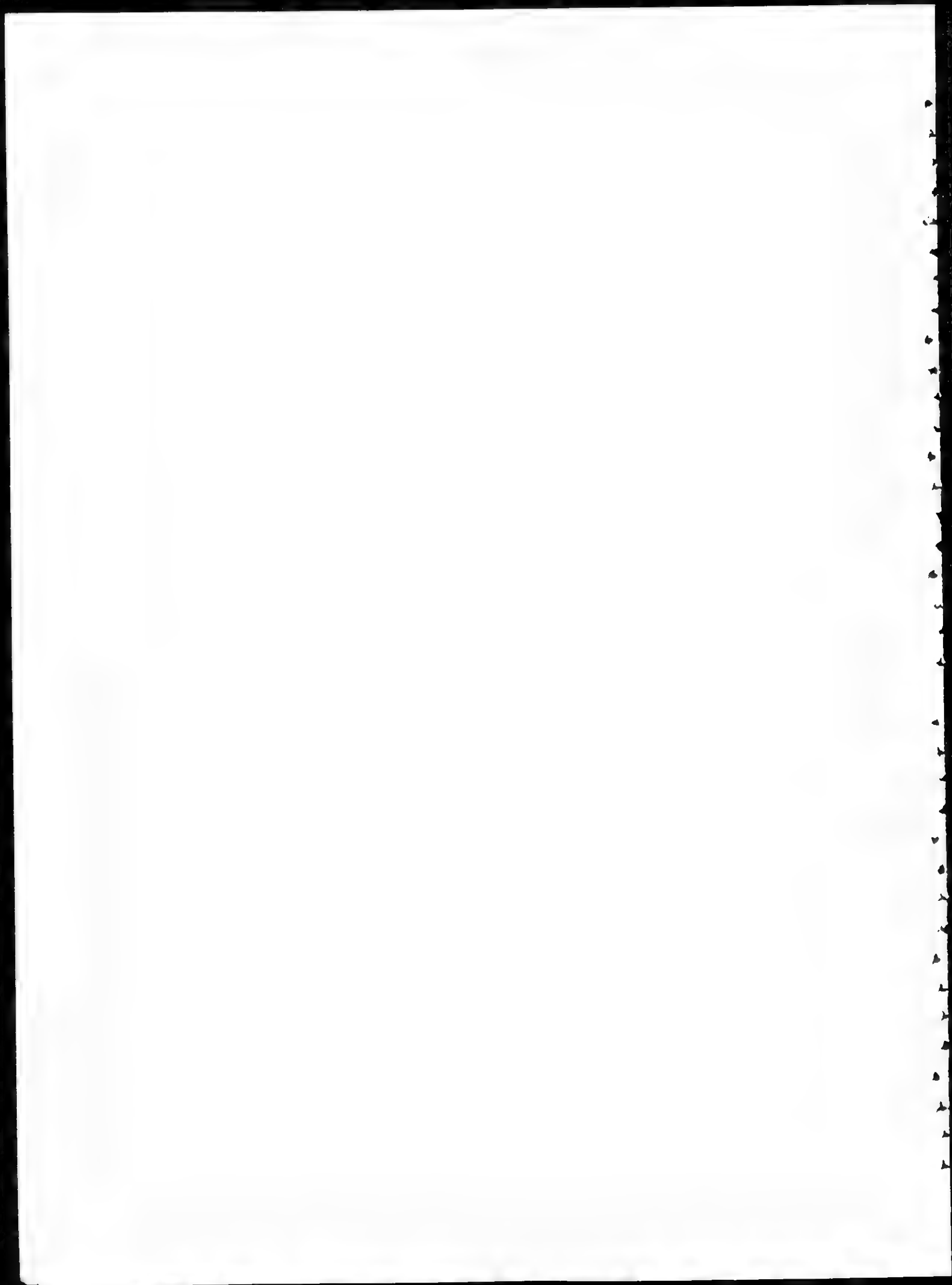
On the other hand, a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice. Consider the following example:

Manufacturer Roe, who makes Brand X pens and sells them throughout the United States, advertises his pen in a national magazine as having a "Suggested Retail Price \$10," a price determined on the basis of a market survey. In a substantial number of representative communities, the principal retail outlets are selling the product at this price in the regular course of business and in substantial volume. Roe would not be considered to have advertised a fictitious "suggested retail price." If retailer Doe does business in one of these communities, he would not be guilty of a deceptive practice by advertising, "Brand X Pens, Manufacturer's Suggested Retail Price, \$10.00, Our Price, \$7.50."

It bears repeating that the manufacturer, distributor or retailer must in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area. For instance, a manufacturer may not affix price tickets containing inflated prices as an accommodation to particular retailers who intend to use such prices as the basis for advertising fictitious price reductions.

* * * * *

/s/ Joseph W. Shea
Secretary.



FEDERAL TRADE COMMISSION
Washington

May 6, 1964

ADMINISTRATIVE BULLETIN 64-10

Subject: Foreign Origin Matters.

Purpose and Scope

1. This Bulletin contains instructions which shall govern staff processing of all foreign origin matters.

A. These instructions shall control all actions of the operating Bureaus of Deceptive Practices and Industry Guidance and all advisory functions of the Bureau of Economics.

B. There shall be cooperation and consultation at all times among the three Bureaus to achieve uniform compliance with these instructions.

Definition

2. Foreign origin matters involve:

A. Affirmative misrepresentation of the country or place of origin of a product or its components; and

B. Failure to disclose the foreign country or place of origin of a product or its components.

Customs Matters

3. All foreign origin matters within the jurisdiction of the Bureau of Customs¹ shall be referred to it by the liaison officer² unless he believes that the Bureau's remedy would be inadequate and that the matter meets the criteria of paragraphs 4 or 5 below.

¹ 19 U.S.C. 1304.

² Pursuant to appointment by the Executive Director dated August 16, 1961. James A. Murray, Assistant Director of the Bureau of Deceptive Practices, is liaison officer with the Bureau of Customs.

APPENDIX G

Page 2 of 3

A. When the liaison officer believes that the Commission should retain jurisdiction he shall make a report and recommendation to the Commission, and no action shall be taken unless ordered by the Commission.

Other Foreign Origin Matters

4. Country-of-origin matters involving affirmative misrepresentation of country of origin are to be treated like other deceptive-practice matters.

5. No action shall be taken in any matter involving nondisclosure of country of origin unless there is a clear and compelling probability that substantial deception and public interest are involved.

A. Among the factors to be considered in evaluating the substantiality of the public interest are:

- (1) The volume of interstate sales of the products;
- (2) The relative importance of the product to consumers;
- (3) The significance to the public of the deception; and
- (4) Whether nondisclosure of country of origin is an industry-wide practice, or respondent's nondisclosure has caused substantial diversion of business from competitors.

B. In a matter involving a product as to which only a component is of undisclosed foreign origin, no action shall be taken unless such component:

- (1) Is a principal part or ingredient, or is a primary functional element; and
- (2) Is not promptly replaceable by one of like quality available in the United States.

C. In a matter involving nondisclosure of foreign origin in an advertisement, no action shall be taken unless ordered by the Commission.

D. Country-of-origin nondisclosure matters shall be accorded low priority.

Additional Considerations

6. Upon determination by the liaison officer that any action in connection with any foreign origin matter may be in conflict with the foreign trade or any other policy of the United States, he shall make a report and recommendation to the Commission; and no such action shall be taken unless ordered by the Commission.

Corrective Action

7. No complaint shall be forwarded for issuance by the Commission unless settlement by administrative treatment or other voluntary procedure has been considered and found to be either clearly inappropriate or ineffectual, which finding shall be set forth and supported in the forwarding memorandum.

By direction of the Commission.

John N. Wheelock,
Executive Director

DISTRIBUTION: Professional Staff

The Tariff Act of 1930 (as amended)
19 U.S.C.A. 1001, Ch. 4, Sched. 3, Par. 367, (a), (b) and (g)

Par. 367

(a) Watch movements, . . . (other timing devices specified)

(b) All the foregoing shall have cut, engraved or die sunk, conspicuously and indelibly on one or more of the top plates or bridges: The name of the country of manufacture; the name of the manufacturer or purchaser; in words and in Arabic numerals the number of jewels, if any, serving a purpose as frictional bearings; and in words or in Arabic numerals, the number and classes of adjustments, or, if unadjusted, the word "unadjusted".

(g) Any of the foregoing cases, containers, or housings, shall have cut, engraved, or die sunk, conspicuously and indelibly on the inside of the back cover, the name in full of the manufacturer or purchaser and the name of the country of manufacture.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand, Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of)
BULOVA WATCH COMPANY, INC.,)
a corporation.)

DOCKET NO. 7583

OPINION OF THE COMMISSION

This matter is before the Commission for consideration of exceptions to the hearing examiner's initial decision filed by counsel supporting the complaint and by counsel for respondent.

The amended complaint in this matter in effect charges respondent watch manufacturer with having violated Section 5(a)(1) of the Federal Trade Commission Act¹ by pre-ticketing its watches with fictitious prices and thereby representing, directly or by implication, that said prices are the usual and customary retail prices for such watches in the trade areas where offered for sale, when in truth and in fact the watches usually sell for substantially lower prices. The complaint further charges that by the above practice respondent places in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the usual and customary retail prices for its watches. Respondent's answer essentially denied all material charges of the complaint.

To prove his case, counsel in support of the complaint relied principally upon testimony of twenty-four watch retailers from the following

¹ 38 Stat. 719 (1914); 52 Stat. 111 (1938); 15 U.S.C.A. § 45(a)(1).

APPENDIX I

Page 2 of 4

four communities: New York City; Newark, New Jersey; Boston, Massachusetts; and Washington, D. C. Counsel for respondent produced thirty-one rebuttal witnesses from the latter three of the above areas.

On October 11, 1962, the hearing examiner issued his initial decision, holding that the allegations of the complaint had been sustained in only the Washington, D. C., area. The order proposed by the hearing examiner would require respondent to cease and desist from falsely pre-ticketing watches ". . . for sale in Washington, D. C., and other jurisdictions in which fair trade agreements are not enforced . . ."

Respondent has taken exception to the hearing examiner's finding that the evidence concerning the sale of respondent's watches at retail in Washington, D. C., provides sufficient basis for the order and has requested that the complaint be dismissed. Counsel in support of the complaint has taken exception to the order on the basis that it is too narrow, in view of the hearing examiner's finding that the watches had been sold in all of the above-mentioned communities ". . . at various prices less than the pre-ticketed price."

Subsequent to the date on which the initial decision herein was filed, the Commission promulgated Guides Against Deceptive Pricing (effective January 8, 1964) which deal specifically with practices of the type challenged in this proceeding. Guide III thereof relates to the advertising of retail prices which have been established or suggested by manufacturers and states in pertinent part:

". . . Typically, a list price [which includes a pre-ticketed price] is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious

danger of the consumer being misled by an advertised reduction from this price.

* * *

"... a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice."

We have reviewed the record in this case and can find no evidence that respondent has pre-ticketed its watches with amounts in excess of the highest prices at which substantial sales were made in the area in which it was doing business. As a matter of fact, the record discloses that in three of the four communities selected by counsel supporting the complaint to show that respondent engaged in fictitious pricing, the products are fair traded and the pre-ticketed prices are the prevailing prices of this merchandise.² The hearing examiner has made the following finding concerning the retail prices of respondent's watches in these communities:

"... with regard to the Newark, New Jersey, New York City, New York, and Boston, Massachusetts areas, the evidence is abundant that, although the prices of respondent's watches vary from the ticketed price to some degree, the respondent has been diligent and reasonably successful in enforcing its pre-ticketed prices as the fair trade prices of its watches. Under these circumstances preticketing cannot be deemed to be meaningless and therefore fictitious or misrepresentative. To the contrary,

² It also appears that even in the one community, Washington, D. C., where the examiner found that the pre-ticketed prices were "meaningless", twelve dealers testified that they sold respondent's watches at the pre-ticketed prices and the majority of these dealers testified that they sold exclusively at such prices.

the respondent's preticketed prices are exceptionally meaningful as a media for enforcement of pre-determined prices within the scope of the fair trade laws of New York, New Jersey and Massachusetts. A substantial likelihood of deception would therefore appear to be remote since the ticketed price (also the fair trade price) of respondent's watches is the usual and regular price generally prevailing in the Newark, New Jersey, New York City, and Boston, Massachusetts trade areas."

Under these circumstances we find no basis for holding that respondent's pre-ticketed prices were fictitious or that the practices challenged by the complaint were deceptive under the new pricing guides. Consequently, the complaint will be dismissed and an order so providing will be issued herewith.

Commissioner MacIntyre not participating, and Commissioner Reilly not participating for the reason that he did not hear oral argument.

February 28, 1964.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of
BENRUS WATCH COMPANY, INC.,
a corporation;
BELFORTE WATCH COMPANY, INC.,
a corporation;
S. RALPH LAZRUS, OSCAR M. LAZRUS,
and BENJAMIN LAZRUS,
individually and as officers of
aforesaid corporations; and
HARVEY M. BOND, STANLEY M. KARP,
NORMAN SLATER, SAMUEL M. FELDBERG,
JAY K. LAZRUS, ROBERT WEIL, MARTIN
J. RASNOW, ROBERT GASSER, CLIFFORD
L. J. SIEGMEISTER, LEO HYMAN and
JULIAN LAZRUS,
individually and as officers of
BENRUS WATCH COMPANY, INC.

DOCKET NO. 7352

FINAL ORDER

Pursuant to § 4.22(c) of the Commission's Rules of Practice, published May 16, 1962, 27 Fed. Reg. 4609, 4621 (superseded August 1, 1963), respondents were served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of the order which the Commission contemplates entering; and

Respondents having timely filed exceptions to the order proposed, which were opposed by a reply thereto filed by counsel supporting the complaint; and the Commission, upon review of these pleadings, having determined that the exceptions filed by the respondents should be disallowed and that the order proposed should be entered as the final order of the Commission:

APPENDIX J

Page 2 of 4

IT IS ORDERED that the initial decision be modified by striking the findings in paragraphs 7 and 9 through 15 contained in the Findings of Fact and substituting therefor the findings and conclusions of the Commission contained in the Commission's opinion.

IT IS FURTHER ORDERED that the initial decision be modified by striking therefrom all paragraphs under the heading "Conclusions" except for those under the Roman numeral IX.

IT IS FURTHER ORDERED that respondents Benrus Watch Company, Inc., a corporation, Belforte Watch Company, Inc., a corporation, and their officers, Oscar M. Lazrus and Benjamin Lazrus, individually and as officers of the above-named corporations, and Harvey M. Bond, Stanley M. Karp, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Clifford L. J. Siegmeister, and Julian Lazrus, individually and as officers of Benrus Watch Company, Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of preticketing merchandise at an indicated retail price, or otherwise setting forth an indicated retail price as to merchandise in any material disseminated or intended for dissemination to the public, when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.
2. The act or practice, in connection with the use of trade-in allowances, allowance certificates, coupons, or other promotions offering price reductions, of setting forth an indicated retail price for which reductions or allowances are to be made unless there is a generally prevailing retail

price in the market in which the act or practice is engaged in, and such indicated retail price is not in excess of the generally prevailing retail price in said market.

3. Representing, directly or by implication:
 - a. That their merchandise is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor shall perform thereunder are clearly and conspicuously disclosed.
 - b. That their watches are "shock proof" or "shock protected" or otherwise representing that their watches possess greater shock resistance than is a fact.
 - c. That dealers in their merchandise will allow a certain amount against the indicated retail price thereof upon the presentation of an allowance certificate or coupon or for any reason in connection with the purchase of said merchandise, unless such allowance is granted without exception.
4. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated to simulate precious metal, without clearly and conspicuously disclosing on such cases the true metal composition of such treated cases or parts.
5. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated with an electrolytically applied flashing or coating of precious metal of less than 1-1/2/1000 of an inch over all exposed surfaces after completion of all finishing operations, without clearly and conspicuously disclosing on such cases or parts that they are base metal which have been flashed or coated with a thin and unsubstantial coating.

APPENDIX J

Page 4 of 4

6. Supplying to, or placing in the hands of, any jobber, retailer, dealer, or other purchaser, means and instrumentalities by and through which they may deceive and mislead the purchasing public in respect to practices prohibited in paragraphs 1 through 5 above.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to respondent Robert Gasser and as to respondent S. Ralph Lazrus, who is deceased.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to respondents Norman Slater, Martin J. Rasnow and Leo Hyman in their individual capacities.

IT IS FURTHER ORDERED that the initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that the respondents, except Robert Gasser and S. Ralph Lazrus, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist set forth herein.

By the Commission, Commissioner Elman not concurring in the provisions of the order, and Commissioner Reilly not participating.

S E A L

/s/ Joseph W. Shea
Secretary

ISSUED: February 28, 1964

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of)
GRUEN INDUSTRIES, INC.,)
a corporation, trading as)
GRUEN WATCH COMPANY.)

DOCKET NO. 8455

OPINION OF THE COMMISSION

By Commissioner Elman:

The complaint in this matter charges respondent, a leading manufacturer of watches, with having preticketed its merchandise with fictitious retail prices, in violation of Section 5 of the Federal Trade Commission Act. In its amended answer, respondent admitted that it had engaged in the unlawful practice charged in the complaint. Consequently, the trial before the hearing examiner was concerned solely with the question of relief. In his initial decision, the examiner entered a cease and desist order containing four paragraphs. Paragraphs 1 and 2 are intended to forbid the specific form of deceptive pricing in which respondent was found to have engaged — what the examiner described as "the wholly artificial and flagrantly deceptive inflation of price tickets" (initial decision, p. 24). Paragraphs 3 and 4, on the other hand, are intended to forbid the deceptive practice of a manufacturer's advertising or disseminating fictitious suggested retail prices. However, in a proviso to paragraphs 3 and 4, the examiner ordered these provisions of the order suspended, on the ground that immediate entry of a "broad" order against respondent would be inequitable because its principal competitors were not subject to such orders.

Complaint counsel have appealed from the initial decision, challenging the suspension proviso and also suggesting certain modifications in the language of the examiner's order. Respondent has also appealed, contending that paragraphs 1 and 2 of the examiner's order are too broad and that paragraphs 3 and 4 should be suspended pending promulgation of a Trade Regulation Rule by the Commission (see Section 1.67 of the Commission's Procedures and Rules of Practice (August 1, 1963)) dealing with the general problem of fictitious pricing in the watch industry.

As already noted, there is no issue as to respondent's violation of law. Concededly, respondent preticketed merchandise with retail prices it knew to be grossly in excess of what the merchandise would actually command in the retail market. These prices were not bona fide estimations of retail value; they were not respondent's customary suggested retail prices for the merchandise in question. These inflated prices were, rather, deliberate fabrications made at the demand of certain retailer customers of respondent who were bent on deceiving the buying public with the offer of nonexistent bargains.

Nothing in the Commission's newly revised Guides Against Deceptive Pricing (issued January 8, 1964) justifies respondent's conduct. On the contrary, the unlawfulness of such conduct is made explicit in Guide III: "a manufacturer may not affix price tickets containing inflated prices as an accommodation to particular retailers who intend to use such prices as the basis for advertising fictitious price reductions" (p. 5). However, while the revised Guides do not change the law with respect to such conduct, they have a definite bearing on the issue of relief — the only issue before the Commission.

As both the parties and the hearing examiner appear to recognize, the fact that respondent has been found guilty of a particularly flagrant form of an unlawful practice does not justify an order limited to the particular flagrant acts; rather, it emphasizes the necessity for an order that will effectively prevent the recurrence of the unlawful practice —

here, the practice of a manufacturer's advertising or disseminating fictitious suggested retail prices for his merchandise. Guide III of the Commission's newly revised Guides Against Deceptive Pricing deal explicitly and at length with this practice. Accordingly, we have drafted an order to cease and desist in the language of Guide III.

Should respondent desire guidance with respect to the requirements of this order, the provisions of Guide III should prove helpful. The Guides are designed to afford practical, concrete guidance and assistance to the businessman as to the requirements of law, or, in this case, to respondent as to the requirements of the cease and desist order. If respondent in the future conforms in good faith to the standards set forth in Guide III, it will be in compliance with the Commission's order. In addition, if Guide III does not answer all of the specific questions that may arise as to respondent's duties under the order, the Commission's procedures afford ample opportunity for obtaining definitive advice from the Commission as to the application and interpretation of the order. Section 3.26(b), Procedures and Rules of Practice (August 1, 1963); see, e.g., Vanity Fair Paper Mills, Inc. v. F.T.C., 311 F.2d 480, 488 (2d Cir. 1962).

Our modification of the cease and desist order contained in the initial decision renders unnecessary an extended discussion of respondent's contention that the "broad" parts of the order should be suspended pending promulgation of an industry-wide Trade Regulation Rule. The unduly broad portions of the order contained in the initial decision, which caused concern to the examiner and to respondent, have been eliminated. With respect to the modified order we are entering, what the Commission recently stated in rejecting a similar contention made by another watch manufacturer is apposite:

"The Commission does not believe that the public interest warrants a suspension of the existing order pending completion of the Commission's proceedings against respondents' competitors. However, the

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Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus pro tanto modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. Compliance with such orders, as thus modified, should not impose on respondents any onerous or unreasonable burden. The Guides give adequate recognition to the legitimate interests of the businessman and are not punitive or inflexible. The fact that respondents are formally obliged to comply with the order should not interfere with the effective marketing of their products or place respondents at an unfair competitive disadvantage vis-a-vis their competitors who, though not under formal order, are equally bound by the substantive requirements of the Federal Trade Commission Act, as defined and particularized — in relation to fictitious pricing — by the recently revised Guides." Clinton Watch Co., F.T.C. Docket 7434 (Order Denying Petition to Reopen Proceeding, issued February 17, 1964.

Commissioner MacIntyre did not concur, and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

February 28, 1964.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of
THE REGINA CORPORATION,
a corporation.

DOCKET NO. 8323

STATEMENT OF COMMISSIONER MAC INTYRE

I am again compelled to issue a separate statement setting forth my views on the Commission's action in modifying a cease and desist order in a deceptive pricing case antedating the revised Guides issued January 8, 1964. In the petition now before us, respondent, Regina Corporation (Regina), requests that the order be set aside in its entirety on the ground that the activities documented by the record do not constitute a violation of Section 5 of the Federal Trade Commission Act as presently interpreted by the Commission in the light of the revised Guides. In the alternative, Regina asks that the order be explicitly modified to conform to the new Guides.

In rejecting respondent's plea that the order be set aside, the Commission employs rather facile generalizations, glossing over the contention that Regina's past activities as documented by the record do not constitute a violation of the law as now construed. Sweeping aside Regina's arguments on this point, the Commission broadly asserts:

"... the standards enunciated in the Guides are intended to be prospective, rather than retrospective, in their application. The public interest would not be served if the Commission were to undertake the time-consuming and unsatisfactory task of attempting to review, in the light of every new policy pronouncement, the records of all the cases in which

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cease and desist orders have become final, in order to ascertain whether the records would support a finding of violation under the new standards. It is very doubtful how accurate such retrospective evaluation could be, or how useful would be a process of continuous reexamination of old, and frequently stale, records."

I cannot adopt this rationale, for the simple reason that it does not come to grips with Regina's contention on this point, which, in fact, raises serious questions meriting a responsive and reasoned reply. At the outset, I may state that the assertion that the Guides are intended to be prospective rather than retrospective in their application avoids the realities of the matter. The Commission has only recently dismissed complaints in a number of proceedings brought prior to the issuance of the revised Guides on the ground that the proof in these proceedings did not meet the new standards. E.g., see Filderman Corporation, Inc., et al., Docket No. 7878 (1964). The Commission's assertion that the Guides are prospective, in rebuttal of respondent's request for rescission, is particularly inappropriate because the application of cease and desist orders are not retrospective but prospective as far as respondent's obligations thereunder are concerned. Regina and respondents in other cases may well question the effect on their future business decisions if all Commission policy reversals of this nature will be prospectively applied without regard to what has gone before.

The Commission, in this instance, has ignored another fundamental consideration. As I understand Section 5 of the Federal Trade Commission Act, the Commission is empowered to issue cease and desist orders only upon a finding that a violation of law has occurred.¹ Unless the

¹ Section 5(b) of the Federal Trade Commission Act states in pertinent part: "... The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served . . . an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice . . ."

Commission comes to grips with the issue of whether respondent's past actions documented in this proceeding are violative of the Act, I do not see how, in good conscience, it can keep in effect a cease and desist order bearing on respondent's future conduct. The justification that a review of the record in this proceeding would be either unduly troublesome or time-consuming does not absolve the Commission from performing its statutory functions. The Commission will have to grapple with this issue, either in this proceeding or in other deceptive pricing cases wherein outstanding orders issued prior to January 8, 1964, are in effect, and the number of cases in this category are, of course, numerous. The Commission may refuse, at this time, to decide the question of whether a respondent's activities leading to an outstanding cease and desist order are in violation of the law as presently interpreted by this agency. We should not, however, be surprised if the courts are asked to fill the vacuum the Commission has left, if we abdicate our functions in this manner.

The Commission's treatment of this issue ignores the further point that a decision on the merits as to whether respondent's past conduct violates the law as now construed is required here so that at least respondent and those on the Commission's staff charged with enforcing this and similar orders will know what the Commission's position is. While the evasion of this question may stave off some admittedly difficult problems in the immediate future, in the long run it can only lead to further disarray in an area of the law already subject to considerable confusion.²

Ignoring the issue of whether the respondent should be under order at all, the Commission has modified Regina's order by elaborating on its "pro tanto" modification procedure employed in Clinton Watch Company, et al., Docket No. 7434 (Order Denying Petition To Reopen Proceeding, issued February 17, 1964), with which I was unable to agree at that time.³

² See my statement on the revised Guides, issued January 8, 1964.

³ See my statement, Clinton Watch Company, et al., Docket No. 7434, February 17, 1964.

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In this instance, in addition to stating that all outstanding orders shall be interpreted and "thus pro tanto modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing", the Commission has specifically amended the order to require respondents to cease and desist from the following:

"Advertising or disseminating any list or pre-ticketed price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondent's trade area."

As I stated in Clinton Watch Company, et al., Docket No. 7434,⁴ respect for the businessmen who come before us, as well as for the appellate courts, requires that Commission orders be drafted with sufficient precision so that they can be understood. Although the modification of the Regina order is somewhat more elaborate than that of Clinton, Regina's obligations are defined with no greater clarity than those of the watch company under its modified order. The modified order in this proceeding is a classic example of the enforcement problems which may be expected from the use of terms which have not been adequately defined by either the courts or this agency.⁵ In this case the Commission has

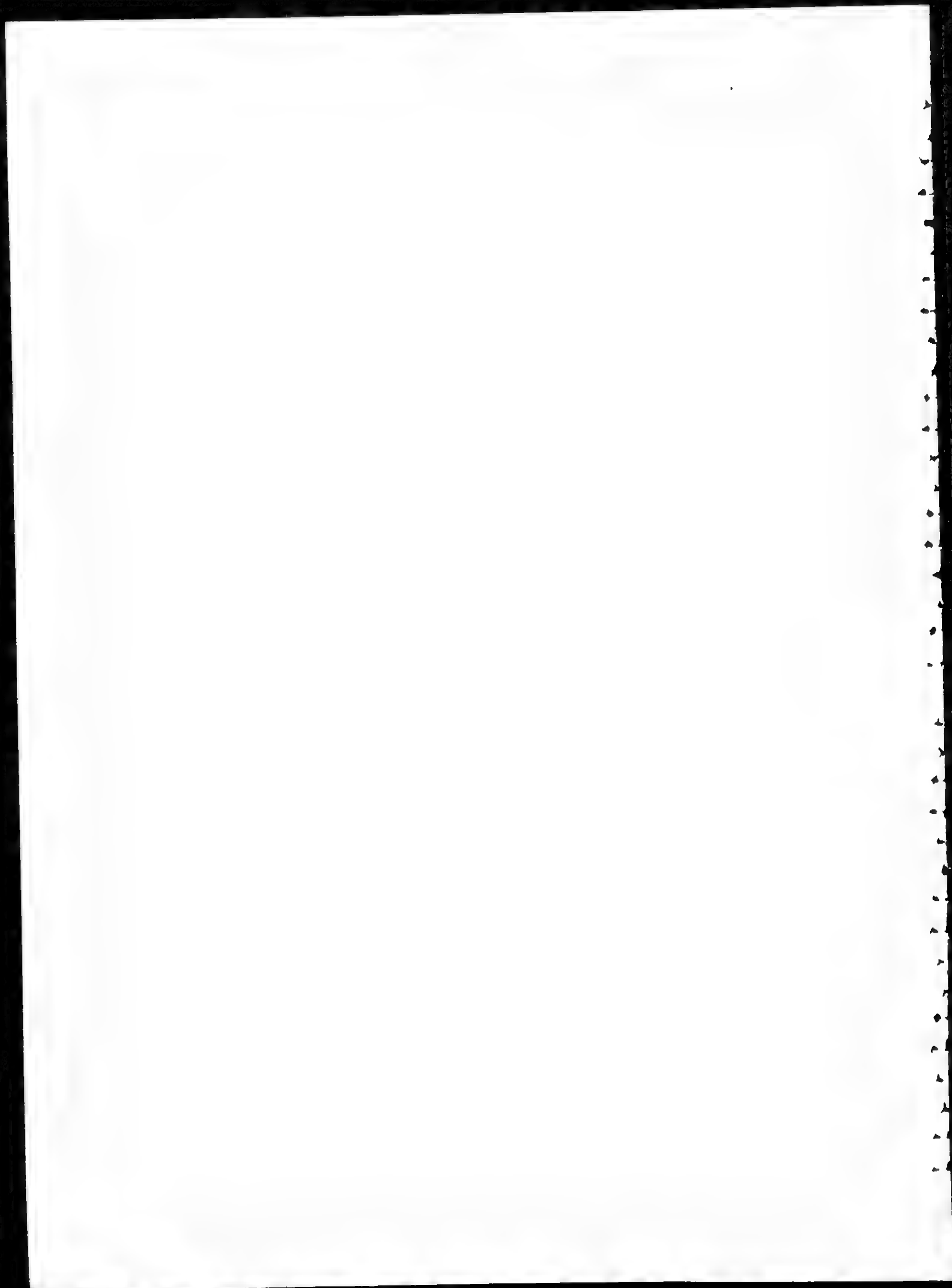
⁴ Id.

⁵ For example, respondent, under the modified order, is required to employ a "good faith estimate" of the actual retail price prior to advertising or disseminating list or preticketed prices. To my knowledge neither the Commission nor the courts have ever defined the criteria for determining the good faith of the seller in estimating actual retail prices in any trade area. There is the further requirement that Regina cease and desist from disseminating list prices or preticketed prices unless such prices do not "appreciably exceed" the highest price at which substantial sales are made in respondent's trade area. Again, there is no precedent which will aid either Regina or other respondents similarly situated or the Commission's staff, for that matter, in determining the meaning of that phrase. The Commission leaves unanswered the question of by what percentage a list price or preticketed price would have to exceed the highest price in a trade area at which substantial sales are made. Respondents and the Commission's staff will be faced with similar difficulties in trying to divine what "substantial sales" might be in a particular trade area. The applicable percentage could conceivably vary from 1 to 100 percent.

done again what the Supreme Court said we should not do, namely, shifted to the courts the burden of determining the factual question of what constitutes unfair conduct. See Federal Trade Commission v. Morton Salt Company, 334 U.S. 37 (1948). I must reiterate my surprise that this Commission, which recently has made so many pronouncements of the necessity for clear and definitive orders is, in the deceptive pricing area, issuing orders, the terms of which are so imprecise and indefinite that they can lead only to administrative and judicial confusion.⁶

April 7, 1964.

⁶ See my statement, Clinton Watch Company, et al., supra n. 3.



UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of
CLINTON WATCH COMPANY, et al.

DOCKET NO. 7434

ORDER ON PETITION
TO REOPEN PROCEEDING

Respondents, on January 2, 1964, filed with the Commission a petition, pursuant to Section 3.28(b)(2) of the Commission's Procedures and Rules of Practice, to reopen proceedings in the above-captioned matter for the purpose of suspending the cease and desist order of July 19, 1960, until final orders become effective in certain cases now pending before the Commission. The order against respondents involves fictitious pricing, and respondents contend that they have been placed at a severe competitive disadvantage by virtue of the fact that their competitors have not yet been placed under Commission order, even though, respondents allege, their competitors are engaged in the same fictitious-pricing conduct forbidden by the order outstanding against respondents.

The Commission does not believe that the public interest warrants a suspension of the existing order pending completion of the Commission's proceedings against respondents' competitors. However, the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus pro tanto modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. Compliance with such orders, as thus modified, should not impose on respondents any onerous or

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unreasonable burden. The Guides give adequate recognition to the legitimate interests of the businessman and are not punitive or inflexible. The fact that respondents are formally obliged to comply with the order should not interfere with the effective marketing of their products or place respondents at an unfair competitive disadvantage vis-a-vis their competitors who, though not under formal order, are equally bound by the substantive requirements of the Federal Trade Commission Act, as defined and particularized – in relation to fictitious pricing – by the recently revised Guides. Accordingly,

IT IS ORDERED that respondents' request to suspend the order of July 19, 1960, be, and it hereby is, denied.

By the Commission, Commissioner MacIntyre not concurring.

S E A L

/s/ Joseph W. Shea
Secretary.

ISSUED: February 17, 1964

Attached is: Statement by Commissioner MacIntyre.

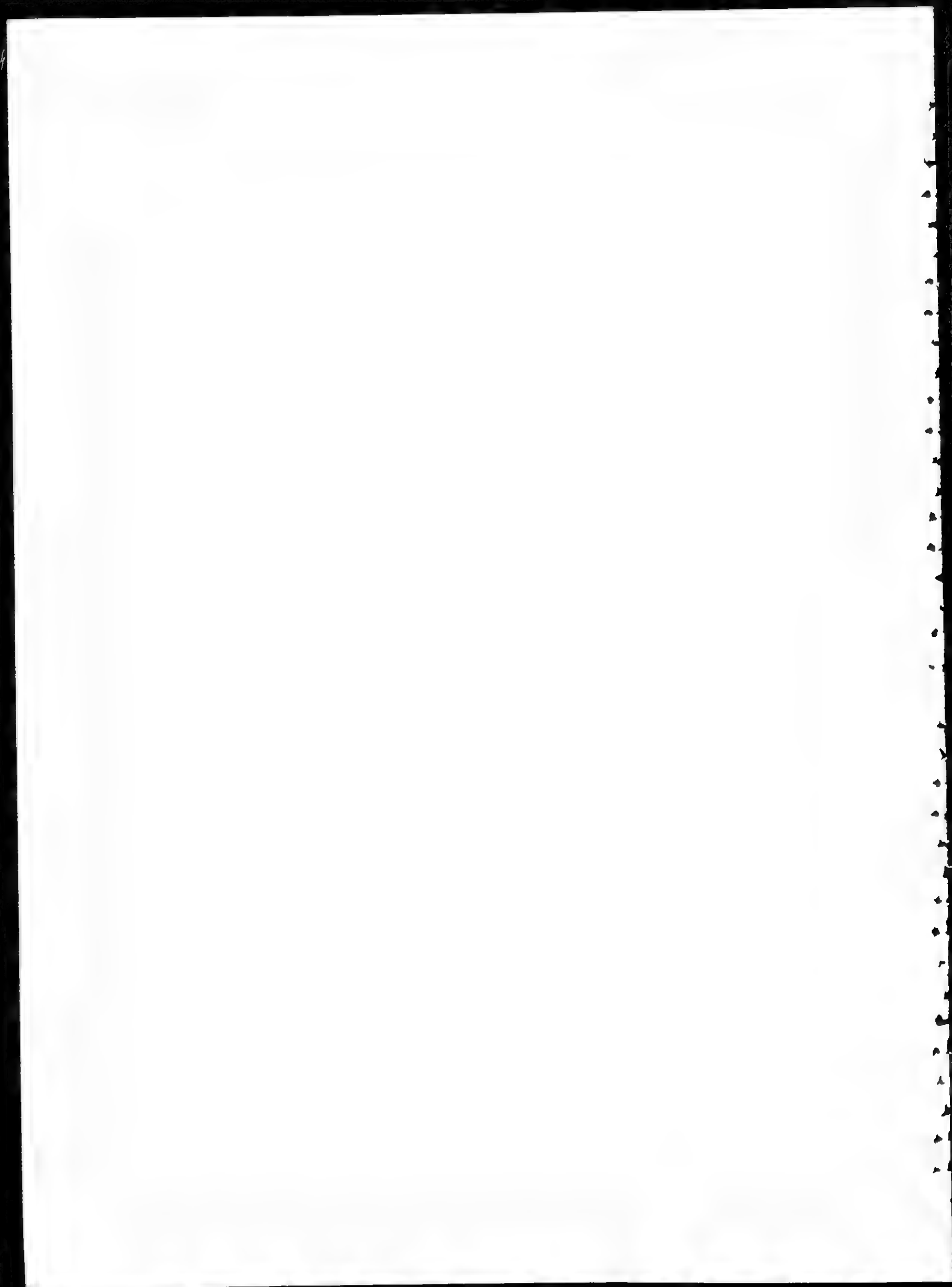
STATEMENT BY COMMISSIONER MacINTYRE

I am compelled to issue a separate statement setting forth my views on the Commission's action in modifying the cease and desist order issued against the Clinton Watch Company in this proceeding. The significant provision amending the order reads as follows:

"... the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus pro tanto modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. ..."

I do not concur with this action for the following reasons. Respect for the businessmen who come before it, as well as for the appellate courts, requires that Commission orders be drafted with sufficient precision so that they can be understood. The wholesale "pro tanto" incorporation of the provisions in the new Guides, adopted in this instance, affords the Clinton Watch Company no guidance for the regulation of its future conduct with respect to its pricing practices. The Guides, of course, cover a multitude of deceptive pricing practices which may or may not be applicable to the Clinton Watch Company and it is doubtful that the "pro tanto" qualification will enlighten either the Commission's staff or respondent as to precisely those terms of the Guides applicable to the Clinton Watch Company. This difficulty is, of course, compounded by the fact that the Guides themselves still require considerable adjudicative definition before either the courts, the Commission, or the business community will be fully advised of their legal significance. In violation of the Supreme Court's injunction in Federal Trade Commission v. Morton Salt Company, 334 U.S. 37 (1948), the Commission here is shifting to the courts the burden of determining the factual question of what constitutes unfair conduct. I am surprised that this Commission, which recently has made so many pronouncements of the necessity for clear and definitive orders, is in this area embarking on a course which can lead only to administrative and judicial confusion by issuing orders, the terms of which are so imprecise and indefinite that they are likely to be misunderstood.

February 17, 1964.



**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly

In the Matter of
ART NATIONAL MANUFACTURERS
DISTRIBUTING CO., INC.,
a corporation,
LOUIS WATCH COMPANY, INC.,
a corporation, and
LOUIS FRIEDMAN, MARTIN FRIED-
MAN, and ALBERT FRIEDMAN,
individually and as officers of
said corporations.

DOCKET NO. 7286

**ORDER DENYING PETITION TO
MODIFY ORDER AND DECISION**

Respondents, by petition filed with the Commission March 26, 1964, have requested that the deceptive pricing provisions of the order entered against them on May 10, 1961, be altered, modified, or set aside or, in the alternative, have requested advice from the Commission on whether particular practices constitute compliance with the order to cease and desist. The sections of the order placed in issue by this petition are those which prohibited respondents from:

- (b) Representing by means of prices on tickets attached to or accompanying merchandise, or by any other means, that any price is the retail price of merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail.
- (c) Furnishing means and instrumentalities to dealers or others by and through which they may misrepresent the usual and customary retail prices of respondents' merchandise.

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The entire order was affirmed and ordered enforced in Art National Manufacturers Distributing Co., et al. v. Federal Trade Commission, 298 F.2d 476 (2d Cir. 1962).

The petition for modification of the above quoted provisions of the order to cease and desist is predicated upon Guide III of the Commission's Guides Against Deceptive Pricing (effective January 8, 1964), which states in pertinent part:

. . . Typically, a list price [which includes a pre-ticketed price] is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.

* * *

. . . a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice.

Respondents assert that a review of the decision in this case reveals that "substantial sales" of their merchandise were made at the "list" price and that had the current Guides been in effect at the time the case was pending before the Commission, the deceptive pricing portions of the charge would have been dismissed. As a result, they now request that the Commission review the evidence in the light of the new guides and alter, modify, or set aside those portions of the order prohibiting deceptive pricing practices.

The standards set forth in the Guides Against Deceptive Pricing are intended to be prospective in their application rather than retrospective. In a case such as this, where the Commission's order has become final and has been affirmed by a United States Court of Appeals, the Commission is of the opinion that it should not review the evidence to determine whether it would support a finding of violation under the new standard. The public interest would not be served if, in the light of every new policy announcement, the Commission were required to undertake the time-consuming task of attempting to review the records of all past cases which might be affected by the policy change. However, the Commission has directed that all outstanding orders involving deceptive pricing shall be interpreted, and thus pro tanto modified, so as to impose on those subject to such orders no greater or otherwise different obligations than are set forth in the Commission's newly revised Guides Against Deceptive Pricing. Clinton Watch Company et al., Docket No. 7434, Order on Petition to Reopen Proceeding (February 17, 1964). The separate advice being furnished respondents, in response to their alternative request, as to whether a proposed course of action, if pursued by them, will constitute compliance with the order, reflects an application of this policy to the order in this case.

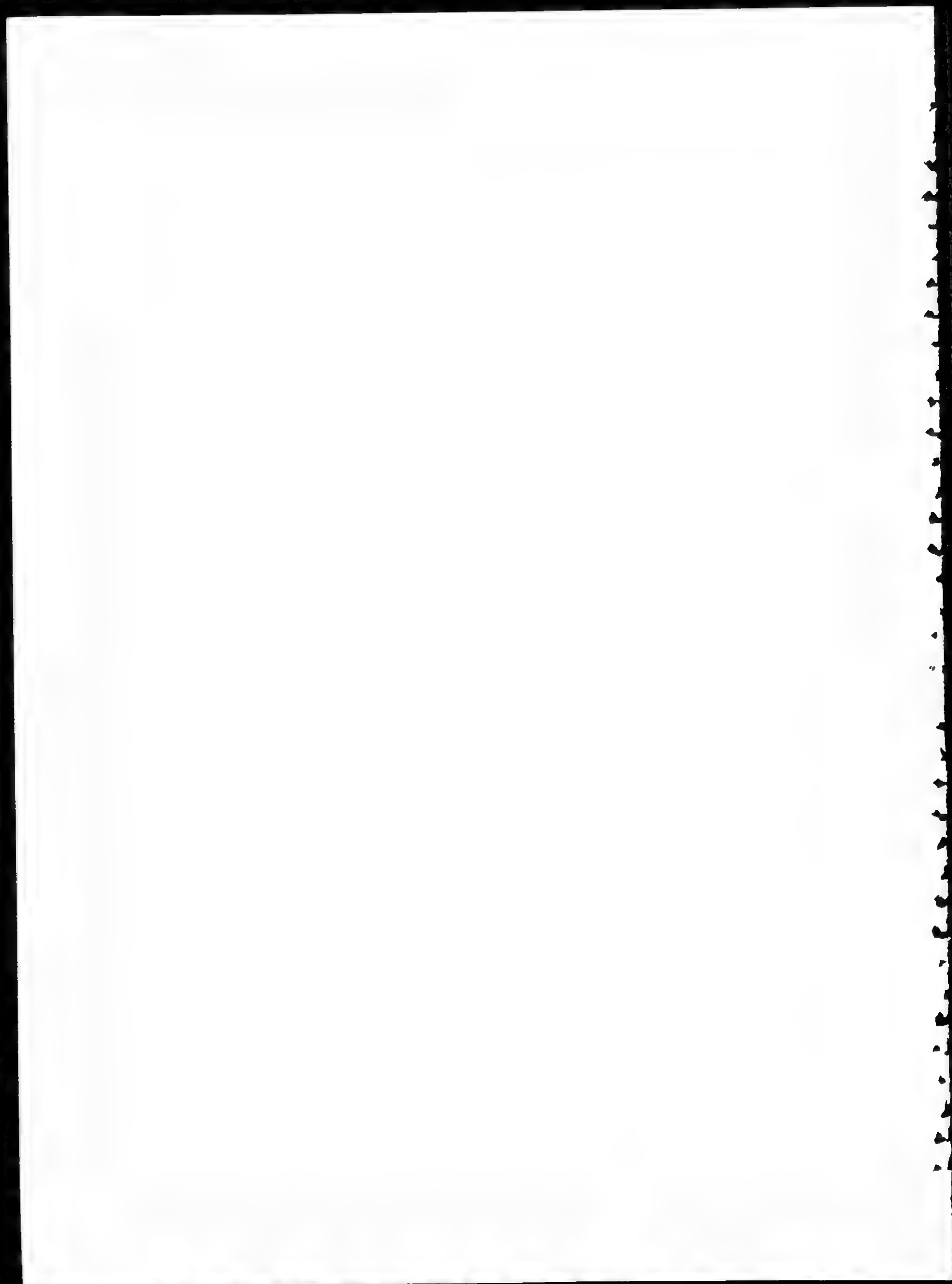
IT IS ORDERED that respondents' petition for modification of the order entered against them on May 10, 1961, be, and it hereby is, denied.

By the Commission. Commissioner MacIntyre does not concur for the reasons set forth in his statements accompanying the Commission's orders in The Regina Corporation, Docket No. 8323 (April 7, 1964), and Clinton Watch Company et al., Docket No. 7434 (February 17, 1964).

S E A L

/s/ Joseph W. Shea
Secretary.

ISSUED: May 8, 1964



Commissioner Everette MacIntyre made a separate statement regarding the revised Guides. His statement is as follows:

STATEMENT ON THE NEW PRICING GUIDES

By MacIntyre, Commissioner:

I am wholly in accord with the professed aim of the Commission to clarify some of the more troublesome problems in the deceptive pricing area. I too believe that we should take a **reasonable** approach in these matters and that the businessman should know where he stands. However, I fear that these Guides, albeit unintentionally, on balance have raised a number of new and troublesome issues which outweigh any solutions to older dilemmas which they may suggest.

The nub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended – uncertainty for consumers, the businessman and the Commission's staff alike. Under the circumstances, there is a serious question that we can sustain the necessary vigour of enforcement even with the best of intentions.

I do not intend at this point to outline my disagreement with the Guides in every detail. If necessary, that can be done as specific problems arise. Suffice it to say for the present, the Guides apparently present us with a new vocabulary in the context of fictitious pricing which will require definition. That process may well be difficult and time consuming. I need only cite one example to make my point. In connection with bargain advertising of retail price comparisons, i.e., the offer of goods at prices purportedly lower than those being charged by others in the same trade area, the Guides state:

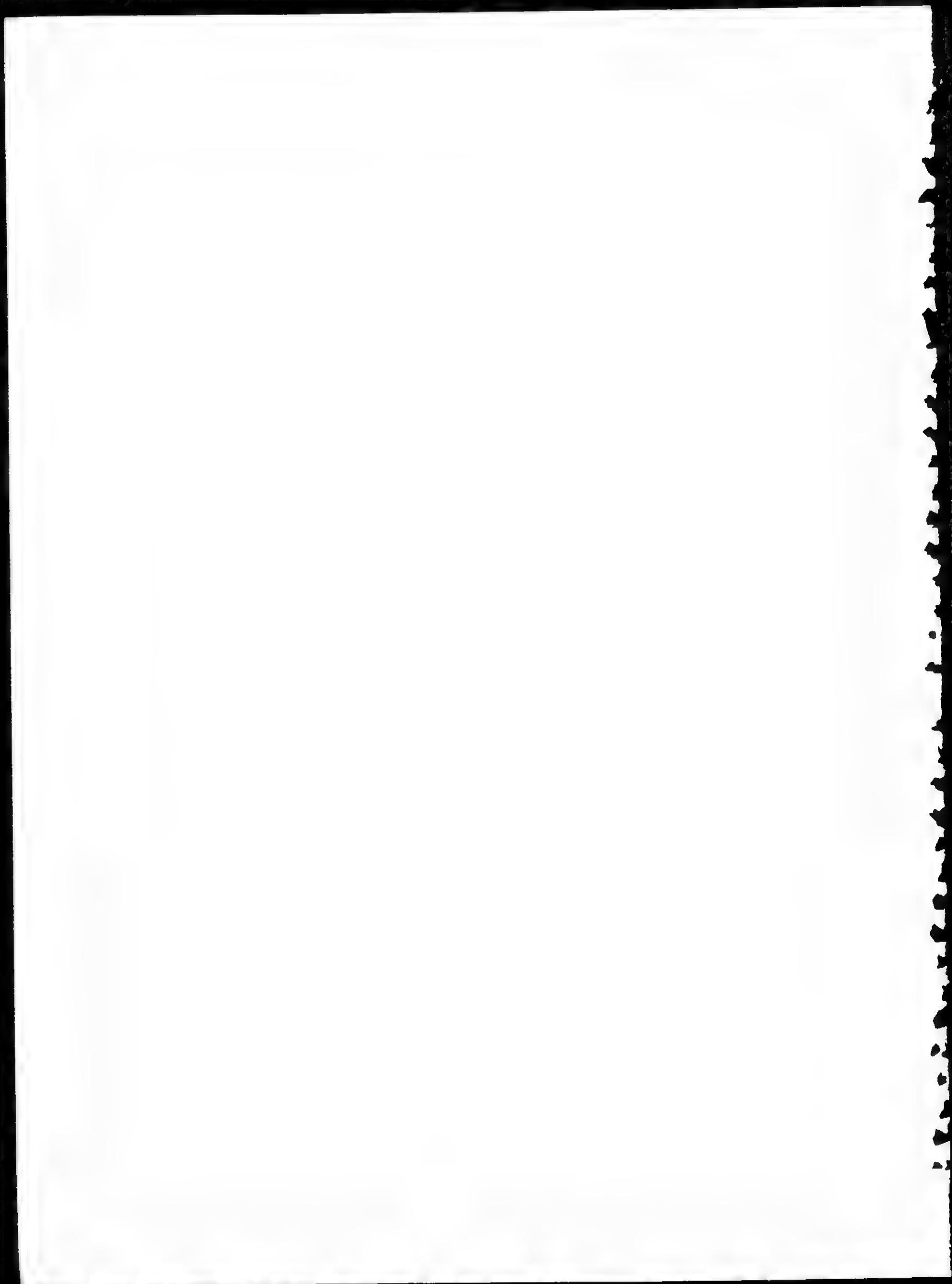
"... Whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area — that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving . . ." (Emphasis supplied.)

The requirement that a retailer should be "reasonably certain" that the higher price does not "appreciably exceed the price at which substantial sales of the article are being made in the area" is open to numerous interpretations. The phrase "reasonably certain" substitutes a subjective for what has hitherto been an objective test. How a businessman is to document the state of his mind in this respect is not pointed out. Possibly the ingenuity of counsel over a period of time may supply some answer to this and other questions. The problem remains, however, whether there is any real advantage in abandoning tested precepts which are now understood by business, the courts and the Commission's staff.

To continue, hitherto the standard applied in these cases has been the "usual and customary" retail price in a given area, a term given content and meaning by numerous previous decisions. The proper interpretation of the requirement that the advertised higher price may not "... appreciably exceed the price at which substantial sales of the article are being made in the area. . ." is at best conjectural. A considerable number of cases will have to be brought and considered by the courts and the Commission before either our staff or the business community can be expected to operate with any confidence under the new standard.

A very important reversal of policy is, of course, contained in Guide III, which deals with advertising of retail prices suggested or established by manufacturers or other nonretail distributors. In effect, manufacturers or other nonretailers are invited to suggest list prices

or preticket their items with only the vaguest standards to determine their responsibility for taking such measures. Whether the Commission will, in the future, be able to take effective steps against fictitious pricing on a regional or national scale under the new dispensation remains to be seen.



(i)

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JOINT APPENDIX

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

In the Matter of
WALTHAM WATCH COMPANY,
a corporation, and
HARRY ARONSON,
BEN COLE and
MORRIS DRAFT, individually
and as officers of said
corporation.

DOCKET NO. 8396

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Waltham Watch Company, a corporation, and Harry Aronson, Ben Cole, and Morris Draft, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent Waltham Watch Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 231 South Jefferson Street, Chicago, Illinois.

During a part of the time referred to hereinafter the individual respondents Harry Aronson, Ben Cole and Morris Draft were officers of Hallmark, Inc., a corporation organized under the laws of the State of

Illinois, which had its office and principal place of business at 231 South Jefferson Street, Chicago, Illinois. Hallmark, Inc. has been merged into the respondent corporation, Waltham Watch Company.

The aforesaid individual respondents are officers of the corporate respondent and they formulate, direct and control the acts and practices of the respondent corporation, and they formulated, directed and controlled the acts and practices of Hallmark, Inc. prior to its merger into the respondent corporation, Waltham Watch Company. The individual respondents' offices and principal place of business is the same as that of the corporate respondent.

PARAGRAPH TWO: In the course and conduct of their business respondents import watches, watch movements, cases and attachments, assemble and sell them. Respondents cause their said products, when sold, to be transported from the State of Illinois and elsewhere, to purchasers thereof located in various other States of the United States and in the District of Columbia.

Respondents have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH THREE: Respondents have engaged in the practice of attaching or causing to be attached, price tickets to their said products upon which certain amounts are printed. Respondents have also disseminated, or caused to be disseminated, price lists, catalogs, catalog insert sheets, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising in which certain amounts are shown as the retail prices of respondents' products. Respondents thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth and in fact, said prices are in excess of the prices at which said watches are usually and customarily sold at retail and are fictitious retail prices.

PARAGRAPH FOUR: Respondents in their advertising, catalogs, brochures and other promotional material represent that their products

are guaranteed by the use of such terms as "guaranteed", "fully guaranteed" or "lifetime guaranteed", and other terms and expressions of which these are typical. Respondents also represent in guarantee certificates that their products will be serviced upon the payment of one dollar. In truth and in fact, the representations as to guarantee are false, misleading and deceptive. The fact that the guarantee provides for payment of a service charge is not set forth in advertising and the respondents frequently impose service charges in excess of that set out in the certificates of guarantee. The terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee.

PARAGRAPH FIVE: The respondents purchase 17 jewel watch movements made in, and imported from, Switzerland, add a device containing 4 or 8 synthetic jewels, and affix attachments to the watches and case the movements. The watches are then represented, advertised, offered for sale and sold by respondents as "21" and "25" jewel watches, to retailers, catalog houses and wholesale distributors.

PARAGRAPH SIX: By means of the statements that the said watches were 21 and 25 jewel watches, respondents represented that said watches contained 21 and 25 jewels, each of which serves a mechanical purpose as a frictional bearing, and that, each jewel provides a mechanical contact at a point of wear. In fact, the jewels in the device added by the respondents are not functional and these watches are not 21 and 25 jewel watches as represented and advertised.

PARAGRAPH SEVEN: The respondents have advertised their said watches in newspapers, jewelers' trade magazines, nationally distributed magazines, catalogs, catalog insert sheets and circulars, and on labels and packages. Among and typical, but not all inclusive, of the statements appearing in such advertising material have been the following:

"Waltham Watches — Timing the
Nation Since 1850"

"Waltham Premier, a famous name, part of the American scene since 1850."

By means of such statements, respondents have represented, directly or by implication, that their said watches are manufactured in the United States by the old and well-known Waltham Watch Company of Waltham, Massachusetts. Such statements are false, misleading and deceptive. In truth and in fact, said watches are not manufactured in the United States by the old and well-known Waltham Watch Company of Waltham, Massachusetts.

PARAGRAPH EIGHT: By the acts and practices aforesaid respondents have placed in the hands of retailers and others, a means and instrumentality whereby such retailers may mislead and deceive members of the purchasing public as to the regular and usual retail prices, the character of the guarantee, the number of friction bearing jewels and the origin and manufacturers of respondents' watches.

PARAGRAPH NINE: Respondents, in the course and conduct of the sale of their watches, have been and are in substantial competition in commerce with other corporations, firms and individuals engaged in the manufacture, sale and distribution of watches.

PARAGRAPH TEN: The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken belief that all of said statements and representations are true, and into the purchase of a substantial number of their watches as a result of such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PARAGRAPH ELEVEN: The aforesaid acts and practices of respondents, as herein alleged, have been and are, all to the prejudice and injury of the public and of respondents' competitors and constituted and

now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this 15th day of May, A.D., 1961, issues its complaint against said respondents.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 28th day of July, A.D., 1961, at 10 o'clock is hereby fixed as the time and Federal Trade Commission Building, Sixth Street and Pennsylvania Avenue, N. W., Washington, D. C., as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondents are without knowledge thereof, a statement to that effect.

If respondents elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondents admit all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer respondents may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner, without further notice to respondents, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C. this 15th day of May, 1961.

By the Commission.

/s/ Joseph W. Shea

SEAL

Joseph W. Shea,
Secretary

ANSWER

Come now respondents by counsel and for their Answer to the Complaint herein submit the following:

1st defense: The Federal Trade Commission lacks jurisdiction of the subject matter and of the parties.

2nd defense: The complaint fails to state a claim upon which relief can be granted.

3rd defense: The Federal Trade Commission had no reason to believe the respondents or any of them, had violated the provisions of Section 5 of the Federal Trade Commission Act at the time the complaint was issued; and said agency had no basis for the allegation that these proceedings will be in the public interest.

4th defense: The Waltham Watch Company, Harry Aronson and Ben

Cole are presently litigating in another commission proceeding identical issues alleged in the complaint herein in other Commission proceedings and the issuance of the complaint here is a malicious multiplicity of law suits and admitted harassment of small business through repetitious litigation of identical issues.

5th defense: The respondents and each of them denies each and every material allegation of Paragraphs One, Two, Three, Four, Five, Six, Seven, Eight, Nine, Ten and Eleven of the Complaint.

WHEREFORE, the premises considered respondents demand that the Complaint be dismissed with prejudice.

/s/ Ben Paul Noble
Ben Paul Noble
Attorney for Respondents
2140 P. Street, N.W.
Washington 7, D. C.
DUpont 7-3291

Dated: November 29, 1961

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Room 1208,
226 West Jackson Boulevard,
Chicago, Illinois,
August 6, 1962

Met, pursuant to notice, at 10:00 a.m.

BEFORE:

HERMAN TOCKER, Hearing Examiner.

* * * * *

2

HEARING EXAMINER TOCKER: This is the third case involving the Waltham Watch Company.

* * * * *

BEN COLE

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

HEARING EXAMINER TOCKER: Give your full name and address.

THE WITNESS: Ben Cole, C-o-l-e, 231 South Jefferson Street, Chicago, Illinois.

DIRECT EXAMINATION

BY MR. MIDDLETON:

Q. What is your present occupation, Mr. Cole? A. I am vice president of the Waltham Watch Company.

Q. What are your functions as vice president? A. General manager assisting in sales.

Q. Who is the president of the corporation? A. Harry Aronson.

Q. Do you know what functions he performs specifically? A. As president of the company he functions as president. He oversees all operations and is concerned with the running of the company.

Q. And are there any other officers? A. Yes.

Q. Will you name them? A. There is Mr. Clifford L. J. Siegmeister, executive vice president and sales manager who lives in New York; and Morris Draft, vice-president in charge of purchasing.
13 Do you want all the officers of the company?

Q. Of this company; that is correct.

Are there more officers? A. The corporate structure has other officers.

Q. Let us have them. A. There is Mr. Irwin Levine, treasurer; Mr. Saul Rubin, vice-president, Donald Pollack, secretary; I guess that covers them all.

Q. What is Mr. Rubin's title? A. Mr. Rubin is vice president.

Q. In charge of what? A. Purchasing in the diamond ring department.

There is one more, Mr. Lawrence Aronson, vice-president.

Q. Does that complete the list of officers? A. That completes the list of officers.

Q. You said Irwin Levine. How does Mr. Levine spell his name?

A. L-e-v-i-n-e.

Q. When was the Waltham Watch Company incorporated? A. The present Waltham Watch Company?

Q. The one that you are vice-president of. Were you one of the original officers of that corporation? A. Of the present Waltham Watch

14 Company?

Q. Yes. A. (No response.)

Q. Do you remember the date of the incorporation, sir? A. I am trying to get clear in my mind whether you mean the company that was since – or when the present Waltham Watch Company obtained what was left.

Q. Will you state what was your position prior to your taking office with the Waltham Watch Company? A. I was vice president of the Hallmark Watch Company.

MR. MIDDLETON: Miss Reporter, will you please mark these Commission's Exhibits Nos. 1-A through 1-D for identification.

(The papers referred to were marked Commission's Exhibits Nos. 1-A through 1-D for identification.)

BY MR. MIDDLETON:

Q. Mr. Cole, I hand you what has been marked as Commission's Exhibits Nos. 1-A through 1-D for identification and ask you if you recognize these documents. A. This one appears to be a certificate issued by the State of Illinois stating that the Hallmark Company has filed – the Hallmark Watch Company has filed with the Secretary of State on December 19 – rather December, 1948, to incorporate in that state.

15 Q. So this would be the certificate of incorporation for the Hallmark Corporation.

MR. NOBLE: I object. I don't think that – this is a legal conclusion and the witness is not qualified to answer. The document will have to speak for itself – if he can identify it.

HEARING EXAMINER TOCKER: Well, I think the objection should be sustained, but I see no reason why the document should not be received as a certified document.

The objection is sustained and the witness' answer was stricken but the document will be received on consent.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 1-A was received in evidence on consent.)

MR. NOBLE: I think, if Your Honor please, we might save time and relieve the record of effort to secure testimony which he may not be best qualified to give.

I will stipulate into evidence all documents of this nature that Mr. Middleton secured during the course of the investigation from Waltham, or its officers. I would like a reference in the record as to what it is.

16 HEARING EXAMINER TOCKER: Why don't you proceed on the record on that basis.

MR. NOBLE: What is this Commission's Exhibit No. 1?

MR. MIDDLETON: Nos. 1-A through -D.

MR. NOBLE: Can we identify Commission's Exhibits Nos. 1-A through -D as a certificate of incorporation of Hallmark, Inc. in the State of Illinois in 1948?

MR. MIDDLETON: Correct.

MR. NOBLE: I will not object to its being offered and received.

HEARING EXAMINER TOCKER: It may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 1-B, -C and -D were received in evidence.)

BY MR. MIDDLETON:

Q. Next, I have a copy of the -- what purports to be a certificate of incorporation of Waltham Watch Company in Delaware, consisting of several pages.

MR. NOBLE: Mr. Cole, you have never seen any of these official documents filed by the company?

THE WITNESS: No, I haven't.

MR. NOBLE: All right, sir.

I will stipulate and permit without objection the reception into evidence the certificate of incorporation of the Waltham Watch Company, a
 17 Delaware corporation as Commission's Exhibits Nos. 2-A through
 -M.

(The papers referred to were marked
 Commission's Exhibits Nos. 2-A
 through -M for identification.)

HEARING EXAMINER TOCKER: What is the date?

MR. MIDDLETON: The 16th day of May 1957. I would not —

HEARING EXAMINER TOCKER: Wait a minute. Let Mr. Noble
 finish.

MR. NOBLE: I would not object to the reception of Exhibit No. 2
 in alphabetical sequence into evidence, however, I would like to note for
 the record that the certificate of incorporation of the Waltham Watch
 Company in Massachusetts in 1923 should be included in the record and
 will be before the proceedings are concluded, as well as the evidence of
 a corporate spinoff of the Massachusetts corporation into two distinct
 corporations; one of which is the Delaware corporation, represented by
 Commission's Exhibit No. 2.

HEARING EXAMINER TOCKER: Well, if that is going to be done
 there is no need to hold back on this?

MR. NOBLE: No, sir.

HEARING EXAMINER TOCKER: It will be received.

18 MR. MIDDLETON: I will object to its reception at this time.

HEARING EXAMINER TOCKER: Well, I don't understand that coun-
 sel imposed any condition on this receipt; he merely made an observation.

MR. NOBLE: For the record, Your Honor, remind me in the event
 that I overlook it at that point to bring it into evidence.

(The papers referred to, heretofore
 marked for identification Commis-
 sion's Exhibits Nos. 2-A through -M
 were received in evidence.)

MR. MIDDLETON: I have here a document consisting of two pages signed by Harry Aronson and entitled "A Plan Of Reorganization, Waltham Watch Company and Hallmark, Inc." which I would like to have marked as Commission's 1-A and -B.

HEARING EXAMINER TOCKER: You don't mean Commission's Exhibits Nos. 1-A and -B?

MR. MIDDLETON: Commission's Exhibits Nos. 3-A and -B; I am sorry.

MR. NOBLE: I have no objection.

HEARING EXAMINER TOCKER: I have not had a chance to read this.

This is not a reorganization plan under any of the provisions of the
19 Bankruptcy Act; is it? It is just an internal voluntary plan of reorganiza-
tion.

(The papers referred to were marked
Commission's Exhibits Nos. 3-A and
-B for identification.)

MR. MIDDLETON: I think, Mr. Examiner, that is a type of plan of reorganization that is used in some tax reorganization merger.

HEARING EXAMINER TOCKER: I don't care about that.

MR. MIDDLETON: It is not a bankruptcy matter.

HEARING EXAMINER TOCKER: I do not know that it has any relevance. I wanted to be sure because of the use of this expression "Plan Of Reorganization."

Proceed.

MR. MIDDLETON: I have here a certificate of ownership merging Hallmark, Inc. issue Waltham Watch Company consisting of four pages and to be marked as Commission's Exhibits Nos. 4-A through -D. These are dated June 13, 1959.

(The papers referred to were marked
Commission's Exhibits Nos. 4-A
through -D for identification.)

MR. NOBLE: Do you offer them?

MR. MIDDLETON: I offer these into evidence.

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

20

(The papers referred to, heretofore marked Commission's Exhibits Nos. 4-A through -D were received in evidence.)

MR. MIDDLETON: I have here a document entitled "Agreement" dated March 23, 1956, between Waltham Watch Company and Waltham Watch Company, a Massachusetts corporation, and Hallmark, Inc., an Illinois corporation, consisting of 12 pages and to be marked as Commission's Exhibits Nos. 5-A through -L.

(The papers referred to were marked Commission's Exhibits Nos. 5-A through -L for identification.)

MR. NOBLE: Mr. Middleton, can we agree that this is an original licensing agreement between Hallmark and Waltham of Massachusetts.

MR. MIDDLETON: I believe that is what it is; yes.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification as Exhibits Nos. 5-A through -L were received in evidence.)

MR. MIDDLETON: I have a second document entitled -

HEARING EXAMINER TOCKER: Is there a stipulation on that or is that only for reference purposes and not binding - and not to be binding on the content because I think the content will speak for itself.

21 MR. NOBLE: Speaks for itself. It is just for reference purposes.

HEARING EXAMINER TOCKER: All right.

MR. NOBLE: Because you are going to have a number of agreements in there and the heading on each of them is going to be "Agreement" and I would like to distinguish it for the record.

HEARING EXAMINER TOCKER: Is it understood then that whatever reference may be made for convenience to any agreement is not binding and does not limit the contents of the agreement or the legal affect of the agreement.

MR. NOBLE: Yes, sir.

HEARING EXAMINER TOCKER: Both counsel agree to that.

MR. MIDDLETON: Yes.

I have a second document entitled "Agreement" which is dated July 16, 1957 and which in its first paragraph refers to the previous Agreement of March 23, 1956.

(The papers referred to were marked Commission's Exhibits Nos. 6-A through -Q for identification.)

MR. MIDDLETON: This Agreement is signed by the Waltham Watch Company, a Delaware Corporation, by Irwin H. Stoltz, vice-president; and Hallmark, Inc., an Illinois Corporation by Harry Aronson, president.

HEARING EXAMINER TOCKER: Well, there was a license agreement by the Massachusetts Company in 1956. Now, this is an agreement which you say refers to the licensing agreement but is now made between Waltham of Delaware and Hallmark; is that correct, gentlemen?

MR. MIDDLETON: That is what this document purports to be.

HEARING EXAMINER TOCKER: If there is no objection it may be received.

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 6-A through -Q were received in evidence.)

MR. MIDDLETON: I have here a document entitled "Agreement" made between Waltham Watch Company, Delaware, and Hallmark, Inc., Chicago, Illinois. This document is dated December 30, 1957 and is signed by the Waltham Watch Company, Joseph Axler, president, and Hallmark, Inc., Harry Aronson.

MR. NOBLE: No objection.

MR. MIDDLETON: This may be marked as Commission's Exhibits Nos. 7-A through -C for identification.

23

(The papers referred to were marked Commission's Exhibits Nos. 7-A through -C for identification.)

HEARING EXAMINER TOCKER: They may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 7-A through -C were received in evidence.)

MR. NOBLE: What was our time span in this case, do you recall, in 1959?

HEARING EXAMINER TOCKER: I don't think we made any provision for that in this case. We did make provision for time span in the prior case, but I will refresh my recollection if you will give me a moment by looking at the pre-trial order.

There was no reference in the pre-trial order and the complaint — this refers to the acts and conduct in the past tense.

MR. NOBLE: I will argue remoteness if that is the way I feel about it.

HEARING EXAMINER TOCKER: I think we will let the record proceed and I think that where any particular act or practice occurred so long ago and has ceased is a matter for consideration with respect to any order will have to be determined after the record is in.

MR. MIDDLETON: Are you ready to proceed?

HEARING EXAMINER TOCKER: Yes.

24 MR. MIDDLETON: I have a document which is a tabulation of sales of Waltham watches by model number, the number of units sold and the total price for the sale of each of the models. This tabulation also includes Hallmark with the model number, number of units sold and the total revenue from the said sales of each model. These are watches that were sold in a spring catalog 1959 of watches with and without resevoil units. The columns are marked with res, r-e-s, meaning with resevoil and without res., r-e-s, meaning without resevoil.

This shall be marked as Commission's Exhibit No. 8.

HEARING EXAMINER TOCKER: May I see that.

(Document tendered.)

(The paper referred to was marked Commission's Exhibit No. 8 for identification.)

HEARING EXAMINER TOCKER: Is there any objection to Commission's Exhibit No. 8?

MR. NOBLE: No objection.

I don't think this was obtained by the company, I believe it was compiled by the investigators.

MR. MIDDLETON: You furnished it to us.

MR. NOBLE: Yes.

HEARING EXAMINER TOCKER: Is there any objection?

25 MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: Would you want to expand on Mr. Middleton's characterization when he said "sales" or "prices" I was a little confused. This appears to be gross sales of particular models.

MR. MIDDLETON: That is correct.

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit 8 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 9 is a similar tabulation, but it does not reveal the gross sales of each of the models as shown on the previous exhibit.

(The paper referred to was marked Commission's Exhibit No. 9 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 9 for identification was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 10 consists of one page and as in Commission's Exhibit No. 8 shows the model number,
26 the number of units of each model sold and the gross revenue from the sale of each model, both with and without resevoil for the Hallmark and Waltham watches. The Waltham watches are identified by the 4400 numbers and the Hallmark watches are identified by the 2600 model numbers.

(The paper referred to was marked Commission's Exhibit No. 10 for identification.)

HEARING EXAMINER TOCKER: What is the purpose of this?
Is this to show public interest in volume?

MR. MIDDLETON: Yes, sir.

This is for the period - the six month period of the fall of 1959.

HEARING EXAMINER TOCKER: My question was directed to 8, 9 and 10.

MR. MIDDLETON: Yes, sir, this certainly shows the public interest in volume of sales.

HEARING EXAMINER TOCKER: No other purpose in offering these exhibits?

MR. MIDDLETON: Well, it shows the volume of sales in connection with the resevoil units. It has to do with the public interest. There is one more of this type which only has the unit number and the volume of sales with and without the resevoil device.

HEARING EXAMINER TOCKER: Is that 10-A and -B or 10 and 11?

27 MR. MIDDLETON: Nos. 10 and 11.

(The paper referred to was marked Commission's Exhibit No. 11 for identification.)

MR. NOBLE: In case we have not done so, and I think we have, respondents will stipulate to interstate commerce with respect to all practices alleged in the complaint.

HEARING EXAMINER TOCKER: It is denied in the Answer, but the stipulation will appear on the record.

Will you accept that stipulation, Mr. Middleton?

MR. MIDDLETON: Yes, sir.

If he stipulates that they are engaged in interstate commerce within the meaning of the Federal Trade Commission Act, I will certainly accept that.

HEARING EXAMINER TOCKER: That is the stipulation as I understand it.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 10 and 11 were received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 12 is a glossy catalog insert for Waltham watches and Hallmark watches on the reverse side. This appears to be two pieces of paper having been fastened –
28 glued together, and shall be treated as a single exhibit.

(The paper referred to was marked Commission's Exhibit No. 12-A and -B.)

HEARING EXAMINER TOCKER: Are you going to bring out by testimony what this paper is, Mr. Middleton? I don't know what it is – I am just pointing out –

MR. MIDDLETON: I believe he will stipulate that this is a glossy catalog insert.

HEARING EXAMINER TOCKER: Well, I would like to know what it is used for? You are talking in generalities here. It may be pretty well known to you but completely new to me.

MR. NOBLE: Mr. Ben Cole will testify to that, Mr. Examiner.

HEARING EXAMINER TOCKER: Very well.

But remember that the record should show what this particular document is.

MR. MIDDLETON: May I make one further comment here. The year, while it is not shown on this document, as a year, by competent testimony I believe that the officers of the corporation can identify the year by the model numbers being offered on the catalog sheets and there will be several such sheets.

29 HEARING EXAMINER TOCKER: Get it in now and then when we go back on testimony if you bring that out and make whatever notes you care to make so that you don't forget.

It may be received on consent.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 12-A and -B was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 13 is a companion exhibit —

HEARING EXAMINER TOCKER: You know when I said I had no knowledge of what that catalog sheet was I meant that the record didn't have the knowledge.

MR. MIDDLETON: I understand.

I have here a companion exhibit being marked Commission's Exhibit No. 13 which identifies by stock number the watches that appeared on Commission's Exhibit No. 12.

(The paper referred to was marked Commission's Exhibit No. 13 for identification.)

MR. MIDDLETON: This exhibit identifies the watches advertised on Commission's Exhibit No. 12 as being effective January 1, 1959. It shows the wholesale cost, the so-called dealer's cost and the suggested retail price.

MR. NOBLE: Does it say "so-called" on it?

30 MR. MIDDLETON: It says "dealer's cost".

MR. NOBLE: Don't identify the document unless you identify what is on the document and not by subjective interpretation.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 13 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 14 is a wholesaler's confidential price list effective July 1, 1959, for Hallmark watches.

(The paper referred to was marked Commission's Exhibit No. 14 for identification.)

MR. NOBLE: Hallmark -- not Waltham?

MR. MIDDLETON: Bears the Waltham Watch Company signature, 231 South Jefferson Street, Chicago.

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 14 for identification was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 15, wholesaler's confidential price list effective July 1, 1958, and inked in to July 1, 1959, Waltham watches distributed by Hallmark, Inc.

MR. NOBLE: No objection.

31

(The paper referred to was marked Commission's Exhibit No. 15 for identification.)

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 15 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit Nos. 16-A and -B is the companion catalog insert glossy colored sheet consisting of four pages as a single insert.

(The paper referred to was marked Commission's Exhibits Nos. 16-A and -B for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 16-A and -B were received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 17 is a wholesaler's confidential price list Waltham watches bulk line, July 1, 1958 to July 1, 1959.

(The paper referred to was marked Commission's Exhibit No. 17 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 17 was received in evidence.)

32

MR. MIDDLETON: Commission's Exhibit No. 18 is a single glossy catalog insert for Waltham watches - two sides, or both sides.

(The paper referred to was marked Commission's Exhibit No. 18 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 18 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit Nos. 19-A and -B are catalog glossy insert sheets for Waltham watches of the series of 4400.

(The papers referred to were marked Commission's Exhibits Nos. 19-A and -B for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 19-A and -B were received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 20 is a wholesalers' confidential price list effective July 1, 1959 and is companion to - is companion exhibit to Commission's Exhibits Nos. 19-A and -B.

33

(The paper referred to was marked Commission's Exhibit No. 20 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 20 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 21 is a wholesalers' confidential price list effective July 1, 1959, Waltham Premier watches of the 44-, 42- etc. series.

(The paper referred to was marked Commission's Exhibit No. 21 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 21 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 22 is a glossy colored insert sheet for Waltham Premier watches, companion to Commission's Exhibit No. 21.

(The paper referred to was marked Commission's Exhibit No. 22 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

34

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 22 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 23 Waltham watches over-the-counter custom series for the 4470W model numbers running from that number up.

(The paper referred to was marked Commission's Exhibit No. 23 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 23 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 24, companion to Commission's Exhibit No. 23, Waltham watches over-the-counter custom series wholesalers' confidential price list effective November 1, 1959.

(The paper referred to was marked Commission's Exhibit No. 24 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 24 was received in evidence.)

35 MR. MIDDLETON: Commission's Exhibit No. 25 is a reproduction of an advertisement appearing in Premium Practices, April 1959.

(Document tendered.)

(The paper referred to was marked Commission's Exhibit No. 25 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 25 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 26 is a reproduction of an advertisement from Life of June 1, 1959 of Waltham watches.

(The paper referred to was marked Commission's Exhibit No. 26 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 26 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 27 is an advertisement from Premium Practices dated July 1959.

(The paper referred to was marked Commission's Exhibit No. 27 for identification.)

36 MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 27 was received in evidence.)

MR. MIDDLETON: I have here a sheet which shall be marked as Commission's Exhibit No. 28-A - 28-A shall apply to the lifetime guarantee, -B a red mark - a little sticker with the No. 4402W on it; Commission's Exhibit No. 28-C shall be the price tag with the number \$79.50 Waltham shock protected; and -D is a little tag with the words "lifetime guaranteed Waltham."

(The papers referred to were marked Commission's Exhibits Nos. 28-A through -D for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: Are these sub-numerals -B, -C and -D conceded to be related to -A, Mr. Noble?

MR. NOBLE: Yes. Let me see that now?

(Document tendered.)

MR. NOBLE: Is that the one you just showed me?

MR. MIDDLETON: Yes.

MR. NOBLE: No objection.

37 HEARING EXAMINER TOCKER: It may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 28-A through -D were received in evidence.)

MR. MIDDLETON: I have here what purports to be an invoice to the Federal Trade Commission from Waltham Watch Company as Commission's Exhibit No. 29. It is numbered M26622 and is dated 4/26/59.

(The paper referred to was marked Commission's Exhibit No. 29 for identification.)

MR. NOBLE: I would like to state for the record that during the course of the investigation Waltham was asked to furnish Commission investigators samples of various type watches that they specified and to describe with respect to each such watch all of the components, where they came from, how they were sold and advertised. This is not an invoice but it is a description of one such watch delivered by Waltham to the Commission investigators during the course of this investigation, because I don't believe that we charged the Commission for any of the watches — any of those watches.

MR. MIDDLETON: I believe some of these watches were returned to Waltham after that —

MR. NOBLE: May have been.

38

MR. MIDDLETON: (Continuing) — purpose had been served.

HEARING EXAMINER TOCKER: I will strike counsel's reference to the document as an invoice. It is merely a memorandum and according to its contents it appears to me to be a consignment memorandum and will allow respondents' attorney's statement to stand for what it is worth.

MR. NOBLE: No objection to its admission.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 29 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 30 is a watch cost sheet for Model No. 4304.

MR. NOBLE: I object to this one. I don't think that cost has any bearing on the relevancy issues of the case.

MR. MIDDLETON: Mr. Examiner, I would like to make this comment about this document. While it is entitled a cost sheet, it is a detailed itemization of how the respondents arrive at a total cost. It shows that total cost. It shows the dealer's cost and the retail price included — and the retail price including the tax which goes on their price tag. The

39 dealer's cost, as will be developed later, is the coded price that appears in catalogs. While we are not specifically interested in the actual cost of these watches, this is informative and will be helpful to the reviewing authorities in arriving at a proper conclusion.

MR. NOBLE: Purely conjecture. I have not had the reviewing authorities arrive at a proper conclusion yet.

HEARING EXAMINER TOCKER: The Hearing Examiner will — well, the Hearing Examiner will attempt to strike that remark, he will allow it to stand.

MR. NOBLE: I want it to go on the record.

HEARING EXAMINER TOCKER: By allowing it to stand the Hearing Examiner does not in any way want it to be regarded as acquiescing in the conclusion sought to be drawn by counsel with respect to treatment which he might have been accorded by the Federal Trade Commission.

MR. NOBLE: My remark had no reference to the Examiner. I don't regard the Examiner as a reviewing authority.

HEARING EXAMINER TOCKER: This pre-ticketing price which reference was made in Paragraph Three of the Complaint — that should be pre-ticketing practice to which reference was made in Paragraph

40 Three of the Complaint has in many instances in the past in cases pending before the Federal Trade Commission been referred to as deceptive pricing. It may be that this breakdown would have a bearing on whether, in fact, the pricing is deceptive. For that reason the objection is overruled and the document will be received.

I take it that the objection was not based on failure to qualify or to relate it to the respondents.

MR. NOBLE: No, sir.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 30 was received in evidence.)

MR. MIDDLETON: Here is another consignment Agreement to be marked as Commission's Exhibit No. 31. This one is dated April 13, 1960, and is numbered 26614.

(The paper referred to was marked Commission's Exhibit No. 31 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received in evidence.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 31 was received in evidence.)

41 MR. MIDDLETON: Commission's Exhibit No. 32 is a watch cost sheet for Hallmark watch No. 2604.

(The paper referred to was marked Commission's Exhibit No. 32 for identification.)

MR. NOBLE: I object.

MR. MIDDLETON: Same comments that apply to Commission's Exhibit No. 30 applies to this Exhibit Commission's Exhibit No. 32.

HEARING EXAMINER TOCKER: Same ruling. Overruled. It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 32 was received in evidence.)

HEARING EXAMINER TOCKER: What Model No. -

MR. MIDDLETON: No. 2604.

Commission's Exhibit No. 33 is a consignment memorandum dated April 13, 1960 and numbered 26615. It relates to Hallmark watch 2624.

(The paper referred to was marked Commission's Exhibit No. 33 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 33 was received in evidence.)

42 MR. MIDDLETON: Commission's Exhibit No. 34 is a watch cost sheet applying to watch No. 2624.

(The paper referred to was marked Commission's Exhibit No. 34 for identification.)

MR. NOBLE: Object.

MR. MIDDLETON: Same comments that apply to the previous cost sheets would apply to this document.

HEARING EXAMINER TOCKER: Same objection, same ruling.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 34 was received in evidence.)

MR. MIDDLETON: Consignment Agreement dated April 13, 1960, and numbered 26616 relating to Waltham watch No. 4402W, Commission's Exhibit No. 35.

MR. NOBLE: No objection.

(The paper referred to was marked Commission's Exhibit No. 35 for identification.)

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 35 was received in evidence.)

MR. MIDDLETON: Watch cost sheet applying to the Watch Model 4402 as Commission's Exhibit No. 36.

(The paper referred to was marked Commission's Exhibit No. 36 for identification.)

43 MR. NOBLE: Object.

HEARING EXAMINER TOCKER: Same objection, same ruling.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 36 was received in evidence.)

HEARING EXAMINER TOCKER: Are you going to have testimony on the customary markups in the industry, Mr. Middleton, or Mr. Noble?

MR. MIDDLETON: I shall have testimony on an actual selling price of the products in the industry.

MR. MIDDLETON: This document, Commission's Exhibit No. 40 is entitled "Hallmark Watch" and carries the number 2536. It is the same as the previous cost sheets that were introduced.

(The paper referred to was marked Commission's Exhibit No. 40 for identification.)

MR. NOBLE: I object.

HEARING EXAMINER TOCKER: Same comments apply.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 40 was received in evidence.)

HEARING EXAMINER TOCKER: Mr. Middleton, does every one of these papers to which you referred to as cost sheet has at the bottom three columns, one entitled "Our Selling" and the next entitled "Dealer's Cost" and the third entitled "Retail - Including Tax". What happens between the price which is in the "Our Selling" column and in the "Dealer's Cost" column since these two prices seem to be different. Is there a middle man or intermediary who gets a commission or cost or profit or something in between there.

MR. MIDDLETON: It depends upon how these watches are sold. These particular watches are sold by catalog and -

HEARING EXAMINER TOCKER: Well, for instance, referring to this Commission's Exhibit No. 40, to which counsel is making his usual objection, I mean, usual objection, you say our selling is \$10.85 and then the dealer's cost is \$14.65. What happens between these two?

MR. MIDDLETON: Mr. Examiner, I can demonstrate that to you by the use of a catalog sheet if I may do so.

HEARING EXAMINER TOCKER: Will that be done during the hearing some time, because the exhibit in and of itself does have that question.

MR. MIDDLETON: Since the question has been raised at this point, I would like very much to demonstrate this.

HEARING EXAMINER TOCKER: Does counsel for the respondents have any objection to your testifying in this manner.

HEARING EXAMINER TOCKER: All right.

MR. MIDDLETON: No opinion testimony on that subject.

Commission's Exhibit No. 37 is a memorandum of consignment dated April 26, 1960, No. 26621, and relating to Model No. 4440W.

(The paper referred to was marked Commission's Exhibit No. 37 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 37 was received in evidence.)

HEARING EXAMINER TOCKER: We are on Commission's Exhibit No. 37 and I suppose No. 38 is going to be same objection same ruling.

44 MR. MIDDLETON: Commission's Exhibit No. 38 is a watch cost sheet for catalog -

(The paper referred to was marked Commission's Exhibit No. 38 for identification.)

MR. NOBLE: Objection.

HEARING EXAMINER TOCKER: Same objection, same ruling.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 38 was received in evidence.)

MR. MIDDLETON: Memorandum consignment dated April 29, 1960, No. 26626 relating to Hallmark watch No. 2536, Commission's Exhibit No. 39.

(The paper referred to was marked Commission's Exhibit No. 39 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 39 was received in evidence.)

MR. NOBLE: Not unless he raises his right hand and takes the oath.

MR. MIDDLETON: I am merely going to refer to these exhibits,

Mr. Examiner.

HEARING EXAMINER TOCKER: Do you want him to be sworn?

MR. NOBLE: I don't think any useful purpose is going to be served.

It is his testimony and there will be other witnesses.

HEARING EXAMINER TOCKER: All right, then bring the witnesses.

Same objection, same ruling, Commission's Exhibit 40.

47 MR. MIDDLETON: Commission's Exhibit No. 41, is a letter acknowledging receipt of the watches referred to in the exhibits we have just introduced.

(The paper referred to was marked Commission's Exhibit No. 41 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: The FTC returned those watches?

MR. MIDDLETON: Those watches were actually returned.

HEARING EXAMINER TOCKER: Received without objection.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 41 was received in evidence.)

MR. MIDDLETON: This is consignment memorandum dated April 26, 1960, numbered 26623 and relates to Hallmark watch No. 2503.

(The paper referred to was marked Commission's Exhibit No. 42 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: Same ruling.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 42 was received in evidence.)

48 MR. MIDDLETON: I have for Commission's Exhibit No. 43 a watch cost sheet for No. 2503 — watch No. 2503.

(The paper referred to was marked Commission's Exhibit No. 43 for identification.)

MR. NOBLE: Object.

HEARING EXAMINER TOCKER: Same ruling.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 43 was received in evidence.)

MR. MIDDLETON: I have here Commission's Exhibit No. 44-A is a cardboard box; 44-B is a plastic box within the cardboard box; -C is a lady's watch; -D is a lifetime guarantee, which is in the cardboard box; -E is a price tag for \$95; and -F is a tag with No. 2503 on one side and on the other side "Life time Guaranteed - Advertised in LIFE".

(The exhibit was marked Commission's Exhibits Nos. 44-A through -F for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The exhibit referred to, heretofore marked for identification Commission's Exhibit Nos. 44-A through -F was received in evidence.)

49 HEARING EXAMINER TOCKER: Is it conceded that the guarantee certificate came with that particular watch?

MR. NOBLE: I will not concede that unless - it is a type guarantee used with that type watch whether it went with that particular watch, I don't know, and I don't think it will be relevant later on, because we are not using the same guarantees any more any way.

MR. MIDDLETON: This is the way it came -

HEARING EXAMINER TOCKER: In other words, what you say it may not be the actual piece of paper but if it isn't the actual piece of paper it is the same as the actual piece of paper that came with the watch.

MR. NOBLE: It is a typical guarantee used by the company for some years and presumably with the watch - with that watch when it was obtained.

HEARING EXAMINER TOCKER: All right.

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The exhibit referred to, heretofore marked for identification Commission's Exhibits Nos. 44-A through -F were received in evidence.)

MR. MIDDLETON: Consignment memorandum dated April 19, 1960, No. 26679 relating to watch No. 2510 Hallmark, Commission's Exhibit No. 45.

50

(The paper referred to was marked Commission's Exhibit No. 45 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 45 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 46 is a watch cost sheet for Watch No. 2510.

(The paper referred to was marked Commission's Exhibit No. 46 for identification.)

MR. NOBLE: I object.

HEARING EXAMINER TOCKER: Same ruling - received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 46 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 47 - beginning with Commission's Exhibit No. 47-A - this series consists of the boxes for watch Model No. 2510 and the watch. The box shall be marked as Commission's Exhibit No. 47-A, which is a cardboard box; the lifetime guarantee shall be marked as Commission's Exhibit No. 47-B; the plastic box Commission's Exhibit No. 47-C; the watch, 47-D; the price tag of \$97.50 is 47-E and the tag bearing the number 2510 on one side and "Lifetime

51

Guarantee - Advertised in LIFE" is Commission's Exhibit No. 47-F.

(The exhibit referred to was marked Commission's Exhibits Nos. 47-A through -F for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The exhibits referred to, heretofore marked for identification Commission's Exhibits Nos. 47-A through -F were received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 48 is a consignment memorandum dated April 19, 1960, and No. 26684 relating to watch No. 4307W.

(The paper referred to was marked Commission's Exhibit No. 48 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 48 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 49 is a watch cost sheet for watch No. 4307.

(The paper referred to was marked Commission's Exhibit No. 49 for identification.)

MR. NOBLE: Objection.

52 HEARING EXAMINER TOCKER: Same ruling. It is received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 49 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 50-A relates to Waltham watch No. 4307 - 50-A is the cardboard box; 50-B is the plastic box; 50-C is the watch; 50-D is the guarantee certificate; 50-E is the price tag of \$71.50 and 50-F is a little tag bearing the inscription "Waltham Since 1860" on one side and "No. 4307, 17 jewels gold colored case G. F. bracelet."

(The exhibit referred to was marked Commission's Exhibits Nos. 50-A through -F for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The exhibits referred to, heretofore marked for identification Commission's Exhibits Nos. 50-A through -F were received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 51 is a consignment memorandum dated April 1960 and No. 26685, relating to watch No. 4311.

(The paper referred to was marked Commission's Exhibit No. 51 for identification.)

MR. NOBLE: No objection.

53

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 51 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 52 is a watch cost sheet for Watch No. 4311.

(The paper referred to was marked Commission's Exhibit No. 52 for identification.)

MR. NOBLE: Object.

HEARING EXAMINER TOCKER: Same objection, same ruling.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 52 was received in evidence.)

MR. MIDDLETON: This is a series of exhibits beginning with Commission's Exhibit No. 53-A, box and watch No. 4311. The cardboard box should be marked Commission's Exhibit No. 53-A; the plastic box 53-B; the watch 53-C; the price tag of \$92.50, 53-D and the tag with the inscription "Lifetime Guarantee - Waltham" is 53-E and on the reverse side of this tag is the No. 4311.

(The exhibits referred to were marked Commission's Exhibits Nos. 53-A through -E for identification.)

MR. NOBLE: No objection.

54

HEARING EXAMINER TOCKER: It may be received.

(The exhibits referred to, heretofore marked for identification Commission's Exhibits Nos. 53-A through 53-F were received in evidence.)

* * * * *

55

MR. MIDDLETON: Commission's Exhibit No. 54 is an assignment memorandum dated May 19, 1960 and No. 26682, relating to watch No. 4420.

(The paper referred to was marked Commission's Exhibit No. 54 for identification.)

MR. NOBLE: No objection.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 54 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 55 is a watch cost sheet for watch No. 4420.

(The paper referred to was marked Commission's Exhibit No. 55 for identification.)

MR. NOBLE: Objection.

HEARING EXAMINER TOCKER: Same ruling as before - received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 55 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 56-A and the alphabetized exhibits are the box and watch known as No. 4420, a Waltham watch.

56

Commission's Exhibit No. 56-A is the cardboard box; 56-B is the plastic inside box; 56-C is the watch; 56-D is the price tag of \$95; and 56-E is a little tag with the inscription "Lifetime Guarantee - Waltham" on one side and the No. 4420 on the other.

(The exhibits referred to were marked Commission's Exhibits Nos. 56-A through -D for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The exhibits referred to, heretofore marked for identification Commission's Exhibits Nos. 56-A through -D were received in evidence.)

MR. MIDDLETON: I would like to note for the record that this watch has the resevoil plate in it.

HEARING EXAMINER TOCKER: All right. Is that agreed to, Mr. Noble?

MR. NOBLE: I cannot agree with that.

MR. MIDDLETON: It is on the cost sheet and I just want to make the notation in the record.

MR. NOBLE: That you believe it has the resevoil plate?

HEARING EXAMINER TOCKER: Counsel does not concede that, but is the cost sheet in evidence on No. 4420?

MR. MIDDLETON: Yes, sir.

57

(Document tendered to Hearing Examiner.)

MR. MIDDLETON: Commission's Exhibit No. 57 is the consignment memorandum dated May 1960 - May 19, 1960, No. 26683 and relating to watch No. 4437.

MR. NOBLE: No objection.

(The paper referred to was marked Commission's Exhibit No. 57 for identification.)

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 57 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 58 is the cost sheet for Watch No. 4437.

(The paper referred to was marked Commission's Exhibit No. 58 for identification.)

MR. NOBLE: I object.

HEARING EXAMINER TOCKER: Is that a cost sheet for 26683?

MR. MIDDLETON: No, it is a cost sheet for No. 4437.

HEARING EXAMINER TOCKER: And what is the consignment memo?

MR. MIDDLETON: Also for No. 4437.

HEARING EXAMINER TOCKER: Same objection, same ruling.

58

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 58 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 59-A, etc. relate to the watch and boxes of watch No. 4437. The cardboard box is 59-A; the plastic box 59-B; the watch is 59-C; the price tag of \$49.50 is 59-D; the guarantee certificate is 59-E and the tag inscribed "Lifetime Guarantee - Waltham" on one side and 4437 on the other side is -F.

(The exhibit referred to was marked Commission's Exhibits Nos. 59-A through -F for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The exhibits referred to, heretofore marked for identification Commission's Exhibits Nos. 59-A through -F were received in evidence.)

MR. MIDDLETON: I have here a Waltham Premier watch and box that it came in which I would like to have marked Commission's Exhibit No. 60-A, etc.

MR. NOBLE: No objection.

MR. MIDDLETON: The cardboard box to be marked as Commission's Exhibit No. 60-A; the inside box shall be called Commission's Exhibit No. -B; the watch itself Commission's Exhibit No. 60-C; the price tag of \$87.50 is -D. This is known as the Waltham "Premier" 25 watch.

59

MR. NOBLE: No objection.

(The exhibit referred to was marked Commission's Exhibit No. 60-A through -D for identification.)

HEARING EXAMINER TOCKER: It may be received.

(The exhibits referred to, heretofore marked for identification Commission's Exhibits Nos. 60-A through -D were received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 61-A, and going through the alphabet appropriately consists of a series of invoices from Hallmark, Inc. and Waltham Watch Company to various customers of theirs throughout the United States.

(The papers referred to were marked Commission's Exhibits Nos. 61-A through 61-Z-189 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 61-A through 61-Z-189 were received in evidence.)

MR. NOBLE: Put it this way: The individual respondents here will be tied in to 6914. That is what you want; isn't it?

60 MR. MIDDLETON: With respect to resevoil device, especially.

HEARING EXAMINER TOCKER: Well, just so the record will not be confused this last remark is something that will be taken care of separately and later after the introduction of all the exhibits.

MR. MIDDLETON: Commission's Exhibits Nos. 62-A and with the appropriate numbers alphabetical appendages, constitute a group of invoices from Waltham Watch Company for the repair of watches presumably under the guarantee provided by Waltham.

(The papers referred to were marked Commission's Exhibits Nos. 62-A through 62-Z-44.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 62-A through 62-Z-44 were received in evidence.)

HEARING EXAMINER TOCKER: Is this exhibit going to be clarified by some testimony, Mr. Middleton?

MR. MIDDLETON: Some of them will, yes; not all of them.

Commission's Exhibit No. 63 which is an invoice from Waltham Watch Company to Mrs. James Buhr, from Clear Lake, Wisconsin; it is No. 142019 and dated April 19, 1960.

61

(The paper referred to was marked Commission's Exhibit No. 63 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 63 was received in evidence.)

MR. MIDDLETON: And I have a letter Commission's Exhibit No. 64A from Mrs. James Buhr, Clear Lake, Wisconsin, consisting of two pages -

MR. NOBLE: No objection.

(The papers referred to were marked Commission's Exhibits Nos. 64-A and -B for identification.)

HEARING EXAMINER TOCKER: It may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 64-A and -B were received in evidence.)

MR. MIDDLETON: (Continuing): - and the letter is dated March 9, 1960, and here is a note apparently attached to it will be 64-B.

And a letter dated March 14, 1960, from Waltham Watch Company to Mrs. Buhr in reply to the previous exhibit as Commission's Exhibit No. 65.

(The paper referred to was marked Commission's Exhibit No. 65 for identification.)

62

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 65 was received in evidence.)

MR. MIDDLETON: And a letter from Mrs. Buhr dated April 6, 1960, Commission's Exhibit No. 66.

(The paper referred to was marked Commission's Exhibit No. 66 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 66 was received in evidence.)

MR. MIDDLETON: An invoice dated May 17, 1960, No. 146612 from Waltham Watch Company to Mrs. Frank Caimi, Commission's Exhibit No. 67.

(The paper referred to was marked Commission's Exhibit No. 67 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 67 was received in evidence.)

MR. MIDDLETON: And Commission's Exhibit No. 68 is a letter dated April 23, 1960, from Mrs. Frank Caimi.

63

(The paper referred to was marked Commission's Exhibit No. 68 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 68 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 69 invoice from Waltham Watch Company to Graves-Humphreys, Inc. It is numbered 144486.

(The paper referred to was marked Commission's Exhibit No. 69 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 69 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 70 is a note on a shipping - duplicate invoice from Graves-Humphreys to Waltham Watch Company No. 6606 and dated April 14, 1960.

(The paper referred to was marked Commission's Exhibit No. 70 for identification.)

MR. NOBLE: No objection.

64

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 70 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 71 is a letter from Graves-Humphreys, Inc. to Waltham Watch Company dated April 22, 1960.

(The paper referred to was marked Commission's Exhibit No. 71 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 71 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 72 is a letter from Mrs. James Armantraut.

HEARING EXAMINER TOCKER: Before you go to a new correspondence did Commission's Exhibit No. 71 close the Graves-Humphreys' incident?

MR. MIDDLETON: That is all that I had on the Graves-Humphreys' incident.

I don't believe there is anything else in the record; I was looking for it -

HEARING EXAMINER TOCKER: Of what value could that be?
65 If the last thing you had was Commission's Exhibit No. 71 from Graves-Humphreys.

MR. MIDDLETON: It shows status.

HEARING EXAMINER TOCKER: Well, I don't know. You will have to establish by testimony whether it was left that way or whether perhaps Waltham made a refund.

MR. MIDDLETON: That would be a matter of defense, wouldn't it?

HEARING EXAMINER TOCKER: I don't think so.

MR. NOBLE: It was agreed at the time that we furnish all of these letters to the investigators and that there was an answer -- if there was an answer they would extract the answer from the file to the letter.

MR. MIDDLETON: There is no answer in here. I am not pulling it from my file. If I had it I would put it in.

HEARING EXAMINER TOCKER: Can we assume for the record that the last thing that happened on the Graves-Humphreys incident was Exhibit No. 71?

MR. MIDDLETON: This is a letter to Waltham Watch asking for an explanation of the chart.

MR. NOBLE: There must be an answer.

MR. MIDDLETON: Yes, there must be an answer somewhere.

66 HEARING EXAMINER TOCKER: Well, if you don't have an answer to that, I don't know what you could establish by putting that in.

MR. MIDDLETON: Well, if they have a letter in their file in response to that, I think Mr. Noble could arrange to have it produced, but I certainly don't have it here.

HEARING EXAMINER TOCKER: Well, offer the production of it and then we will go to something else.

MR. NOBLE: It is self-serving. It serves no purpose.

Are you going to receive this or withhold it? Shall I take it with me and see if I --

HEARING EXAMINER TOCKER: I will receive it under the pre-trial order of the document received in the files of the respondents, but this and

the preceding material are a group of papers with respect to which I have some doubt about from the point of establishing anything within the allegation of the complaint.

MR. MIDDLETON: It goes --

HEARING EXAMINER TOCKER (Continuing): Unless, as Mr. Noble said awhile ago, before I asked the question whether it could be assumed from the record that if there is no answer offered that was the
67 way the matter was left hanging than it is something else entirely.

MR. NOBLE: They answer every letter.

MR. MIDDLETON: I would make a request at this time that such a letter of reply be produced.

MR. NOBLE: It would be difficult. I am sure that -- what is his name, the gentleman that was here -- I am sure that the investigators as they went through the correspondence files they were completely at liberty to take what they wanted and that they extracted and copied the full correspondence.

MR. MIDDLETON: That is my assumption too.

HEARING EXAMINER TOCKER: Well, you will have to put Mr. Klaymon on the stand and ask him about that paper, if he found a reply in the correspondence file.

You are on Commission's Exhibit No. 72 which is a letter from Mrs. Armantraut.

MR. MIDDLETON: Commission's Exhibit No. 72 a letter from Mrs. Armantraut dated March 30, 1960.

(The paper referred to was marked Commission's Exhibit No. 72 for identification.)

MR. NOBLE: I have no objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 72 was received in evidence.)

68 MR. MIDDLETON: Commission's Exhibit No. 73 is an invoice from Waltham Watch Company to Mrs. Armantraut, which is No. 144865.

(The paper referred to was marked Commission's Exhibit No. 73 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 73 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 74 is a letter from Mrs. Armantraut dated May 2, 1960.

(The paper referred to was marked Commission's Exhibit No. 74 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be admitted.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 74 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 75 is a letter from Mrs. Armantraut dated May 11, 1960; and Commission's Exhibit No. 76 is a letter from Waltham Watch Company to Mrs. Armantraut dated May 9, 1960.

(The papers referred to were marked Commission's Exhibits Nos. 75 and 76 for identification.)

69 MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 75 and 76 were received in evidence.)

MR. MIDDLETON: And Commission's Exhibit No. 77 a Waltham Watch Company invoice to Mrs. James Armantraut dated May 19, 1960.

(The paper referred to was marked Commission's Exhibit No. 77 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 77 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 78 is an invoice from Waltham Watch Company to Rhea Wholesale Company, dated April 4, 1960.

(The paper referred to was marked Commission's Exhibit No. 78 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 78 was received in evidence.)

70 MR. MIDDLETON: Commission's Exhibit No. 79 is a purchase order blank with a note on it from Rhea Wholesale Company to Waltham Watch Company dated April 8, 1960.

(The paper referred to was marked Commission's Exhibit No. 79 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 79 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 80 is an invoice from Waltham Watch Company to Rhea Wholesale Company, dated April 15, 1961.

(The paper referred to was marked Commission's Exhibit No. 80 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 80 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 81 is on an invoice form from Drug Fair to Waltham Watch Company dated March 30, 1960.

71

(The paper referred to was marked Commission's Exhibit No. 81 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 81 in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 82 is a letter from Drug Fair Stores dated April 14, 1960, to Waltham Watch Company.

(The paper referred to was marked Commission's Exhibit No. 82 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 82 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 83 is a letter from Waltham Watch Company dated April 25, 1960, to Drug Fair.

(The paper referred to was marked Commission's Exhibit No. 83 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 83 was received in evidence.)

72

MR. MIDDLETON: Commission's Exhibit No. 84 is a letter to Hallmark from Philip L. Banach, dated November 4, 1959. It has a stamp date on it apparently received date of January 4, 1960.

(The paper referred to was marked Commission's Exhibit No. 84 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 84 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 85 is an invoice dated November 24, 1959 to Mrs. Banach.

(The paper referred to was marked Commission's Exhibit No. 85 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 85 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 86 is a letter from Mrs. Banach to Waltham dated January 4, 1960.

(The paper referred to was marked Commission's Exhibit No. 86 for identification.)

73

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be admitted.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 86 was received in evidence.)

MR. MIDDLETON: A letter from Otto Bast to Waltham Watch Company with a stamp date on it of January 4, 1960, Commission's Exhibit No. 87.

(The paper referred to was marked Commission's Exhibit No. 87 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 87 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 88 is an invoice from Waltham Watch Company to Mr. Bast with a date received of November 23, 1959.

(The paper referred to was marked Commission's Exhibit No. 88 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 88 was received in evidence.)

74 HEARING EXAMINER TOCKER: What is that date?

MR. NOBLE: November 23, 1959.

HEARING EXAMINER TOCKER: Would that be 1959 or 1960?

Let us get this straight. Commission's Exhibit No. 87 is Otto Bast to Waltham January 4, 1960; Commission's Exhibit No. 88 is Waltham to Bast November 23?

MR. MIDDLETON: Your Honor, there is a stamp date on there.

And the next exhibit is Commission's Exhibit No. 89 a letter from Otto Bast dated November 20, 1959.

(The paper referred to was marked Commission's Exhibit No. 89 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 89 was received in evidence.)

MR. NOBLE: Mr. Examiner, may we have a five minute recess?

HEARING EXAMINER TOCKER: Yes.

(Short recess.)

HEARING EXAMINER TOCKER: On the record.

75 MR. MIDDLETON: Commission's Exhibit No. 90 is a consignment memorandum dated May 19, 1960, from Waltham Watch Company No. 26681, relating to Watch No. 2603.

(The paper referred to was marked Commission's Exhibit No. 90 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 90 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 91 is a watch cost sheet for watch No. 2603.

(The paper referred to was marked Commission's Exhibit No. 91 for identification.)

MR. NOBLE: Object.

HEARING EXAMINER TOCKER: Same objection, same ruling.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 91 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 92 is a series of exhibits beginning with No. 92-A consisting of a watch and a box contained therein.

Commission's Exhibit No. 92-A is the cardboard box; Commission's Exhibit No. 92-B is the plastic box with the inscription Hallmark;
76 -C is the watch; -D is the price tag for \$100; and 92-E is a little tag with the inscription "Lifetime Guarantee - Advertised in LIFE" on one side, and the other side No. 2603; 92-F is the lifetime guarantee which includes a statement of description showing "Incabloc Protection and Resevoil U. S. Pat. No. 2478865".

(The exhibits referred to were marked Commission's Exhibit Nos. 92-A through -F for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The exhibit referred to, heretofore marked for identification Commission's Exhibits Nos. 92-A through -F for identification were received in evidence.)

HEARING EXAMINER TOCKER: There is no Incabloc shock protection issue in this case.

MR. MIDDLETON: I said this by way of description, Mr. Examiner.

HEARING EXAMINER TOCKER: I just wanted to be sure.

MR. MIDDLETON: Commission's Exhibit No. 93 is a consignment memorandum dated May 19, 1960, No. 26686 covering watch No. 2621.

77

(The paper referred to was marked Commission's Exhibit No. 93 for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 93 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 94 is a watch cost sheet for No. 2621.

(The paper referred to was marked Commission's Exhibit No. 94 for identification.)

MR. NOBLE: Object.

HEARING EXAMINER TOCKER: Same ruling.

(The paper referred to, heretofore marked for identification Commission's Exhibit No. 94 was received in evidence.)

MR. MIDDLETON: Commission's Exhibit No. 95, etc. is the watch and box identified as No. 2621. The box is Commission's Exhibit No. 95-A — the cardboard box; 95-B is the plastic box; the watch is 95-C; and the price tag of \$57.50 is 95-D; and the little tag inside inscribed "Lifetime Guarantee — Advertised in LIFE" on one side and No. 2621 on the other side is 95-E; the guarantee certificate contained herein also refers to Incabloc shock protection and resevoil patent number.

78

(The exhibits referred to were marked Commission's Exhibits Nos. 95-A through -E for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The exhibits referred to, heretofore marked for identification Commission's Exhibit Nos. 95-A through -E were received in evidence.)

HEARING EXAMINER TOCKER: Just for the purpose of reviewing the record now all exhibits thus far offered and received have been received without objection excepting Exhibits Nos. 32, 34, 36, 38, 40, 43, 46, 49, 52, 55, 58, 91 and 94. The record may show that with respect to each of those counsel for the respondents made objection and with respect to each objection the objection was overruled and the exhibits received.

Counsel is not bound by the statement I just made if it appears that I skipped one the record will speak for itself.

There has been reference time and again to advertisements in Life. Does the record have - will the record have those advertisements?

MR. NOBLE: I think he put one in this morning.

MR. MIDDLETON: I think that is all that I have in the way of advertisements in Life.

79 MR. MIDDLETON: Commission's Exhibit No. 96 consisting of a letter from Mr. Ben Cole to Daniel Zmuda, Federal Trade Commission, Chicago Field Office, and with his letter he transmitted a series of catalog colored glossy insert sheets for Hallmark and Waltham together with a list showing the stock number or item number and whether the watch has a resevoil device in it. Each sheet also shows whether the watch was imported complete from Switzerland and such a sheet is included with each one of the catalog sheets.

(The paper referred to were marked Commission's Exhibit No. 96-A through 96-Z-24.)

MR. NOBLE: No objection.

MR. MIDDLETON: Also included in here samples of the guarantee certificates that have been used for the respective years.

MR. NOBLE: No objection to the admission in toto of the exhibits even to the reporter's discretion of marking them according to the rules.

HEARING EXAMINER TOCKER: It may be received.

(The papers referred to, heretofore marked for identification Commission's Exhibits Nos. 96-A through 96-Z-24.)

MR. MIDDLETON: Commission's Exhibit No. 97-A.

80 Mr. Examiner, do you have any instructions as to marking the front pages here.

HEARING EXAMINER TOCKER: According to the reporter's contract.

MR. NOBLE: Let the record show that the exhibit was put together by the respondents at their own time and expense at the request of the Commission.

HEARING EXAMINER TOCKER: Well, I suppose it can be stated that every exhibit that has been offered thus far or any other exhibit received from the respondents was voluntarily given by the respondents; is that correct, Mr. Middleton?

MR. MIDDLETON: These were all obtained through the respondents; yes, so far.

HEARING EXAMINER TOCKER: Voluntarily given?

MR. MIDDLETON: "Voluntarily" is a wonderful word. I don't know whether you want to say voluntary after this matter has been fought to the Supreme Court.

HEARING EXAMINER TOCKER: Well, I did not know that.

MR. MIDDLETON: This information was obtained on investigational subpoenas which went up to the Supreme Court, on at least one occasion, and, I believe, there were two cases.

81 MR. NOBLE: But as soon as the order on the subpoena was enforced the office was turned over to the Commission.

MR. MIDDLETON: There was some delay after that.

HEARING EXAMINER TOCKER: Off the record.

(Discussion off the record.)

HEARING EXAMINER TOCKER: All right, let us proceed.

MR. MIDDLETON: Commission's Exhibit No. 97, I have an advertisement here in the Hagn catalog for 1962 spring/summer supplement No. 621, and on page 109 shows the Waltham watches but it is not a colored glossy print.

(The catalog referred to was marked Commission's Exhibit No. 97 for identification.)

MR. NOBLE: I object to it on the basis that it is irrelevant to the issues in the complaint. If it appeared in 1962 it was two years after the complaint was issued.

MR. MIDDLETON: Mr. Examiner, the basis of the offer is that there has been something said about practices and change in practice since the Hallmark people have taken over the operation of the Waltham Watch Company and this is quite current.

HEARING EXAMINER TOCKER: And this is quite current.

82 MR. NOBLE: I withdraw the objection.

HEARING EXAMINER TOCKER: There is something more important that I would like to have straightened out in the record.

Is the connection of the respondents to this page 109 the same connection as was made with respect to various glossy prints from catalog sheets in evidence?

MR. NOBLE: No.

HEARING EXAMINER TOCKER: In other words can it be conceded for the record that respondents supplied this sheet?

MR. MIDDLETON: No, I would not offer it as being supplied to Hagn by the respondents. I think, and I don't with all due deference to Mr. Noble's indulgence here, that the information contained on that sheet was probably furnished to Hagn and they made a selection of what they wanted and made up their own sheet, perhaps information furnished to them by Hagn.

HEARING EXAMINER TOCKER: Perhaps you had better just hold the Exhibit No. 97. I will sustain the objection at this time and perhaps you can establish or qualify it by interrogating Mr. Cole when he returns to the stand. It is just marked at this time.

MR. MIDDLETON: Commission's Exhibit No. 98-A is a watch and the boxes it's contained in identified as a Hallmark watch and Commission's Exhibit No. 98-A is the cardboard box; 98-B is the plastic box; 98-C is a lady's watch contained in the box therein; -D is the little tag marked "Lifetime Guaranteed - Advertised in Life" on one side and on the other side No. "2307HK 25 jewels R.G.P. Case G. F. Bracelet"; and 98-E is the \$75 price tag.

(The exhibits referred to were marked Commission's Exhibits Nos. 98-A through -E for identification.)

MR. NOBLE: No objection.

HEARING EXAMINER TOCKER: It may be received.

(The exhibits referred to, heretofore marked for identification Commission's Exhibits Nos. 98-A through -E for identification were received in evidence.)

* * * * *

92 August 7, 1962.

* * * * *

96 MR. NOBLE: * * * Now, the respondents are willing to stipulate and propose to do so as follows:

That in 1956 Joseph and Melvin among others acquired control of the Waltham Watch Company, a Massachusetts Corporation, said corporation being incorporated in that state in 1923. Said corporation further being the successor to a private enterprise founded by Denison in Waltham, Massachusetts in 1849.

During that same year; that is, 1956, the Waltham Watch Company of Massachusetts licensed Hallmark, Inc., an Illinois corporation, granting to that corporation in Illinois the exclusive use of the trademark and tradename Waltham on watches. By virtue of that license the trademarks and tradenames Waltham was licensed for use by Hallmark, Inc.

In July 1957 the Waltham Watch Company by means of a spin-off transferred its watch business to a new corporation organized in Delaware and known as the Waltham Watch Company, transferring to that

company all rights, licenses, trademarks and tradenames with reference to the watch and clock business subject to the pre-existing license above-referred to granted in 1956 to Hallmark, Inc.

Respondents will further stipulate that the individual respondents in this action, Harry Aronson, Ben Cole and Morris Draft, were at the time of the license agreement in 1956 between Waltham of Massachusetts and Hallmark, Inc., officers and directors of Hallmark, Inc. and solely
98 responsible for the policies, acts, and practices involved in the subject matter of this complaint.

At the time of the spin-off in 1957, at which time a Delaware corporation acquired the rights in the watch and clock business formerly owned by the Waltham Company of Massachusetts that latter company, the Massachusetts corporation, changed its name and since that time has been known as and trading as the Waltham Precision Instrument Company.

The aforementioned brothers, Joseph and Melvin, were until 1959 officers and directors responsible for the acts and practices of both corporations bearing the name Waltham – that is Waltham Precision Instrument and Waltham Watch Company.

In 1959 the Waltham Watch Company of Delaware was merged with Hallmark, Inc. Since that merger the individual respondents named in this complaint, Ben Cole, Harry Aronson and Morris Draft, have been responsible for the acts and practices with respect to advertising alleged in this complaint so that with respect to the use of the Waltham name on watches the individual respondents named in this complaint have as a matter of law by virtue of a contract agreement in charge with the responsibility for the use of the trademark and tradename Waltham since
99 1956 when Hallmark acquired a license agreement from Waltham of Massachusetts.

And since 1959, the time of the merger, these individual respondents have been responsible for all policy matters involving the Waltham Watch Company of Delaware.

We are willing to so stipulate.

* * * * *

100 HEARING EXAMINER TOCKER: That is the next step then as to what you want to do in that respect.

101 He accepted this stipulation now are you ready to make another stipulation with respect to resevoil and the use of the name Waltham. That will eliminate those two elements in this case entirely.

MR. NOBLE: With respect to paragraphs five and six of the complaint here; is that correct?

MR. MIDDLETON: Yes, relating to the resevoil.

MR. NOBLE: (Continuing) Which are essentially and substantively the same as related paragraphs in Docket No. 6914, the respondents will stipulate that the individual respondents named in this action; Ben Cole, Harry Aronson and Morris Draft had since 1956 been responsible for the advertising involving the use of the resevoil device which the subject of the paragraphs five and six and we will further stipulate that they will be bound without further evidence being required by the order entered against the Waltham Precision Instrument Company, the Waltham Watch Company and other individual respondents in No. 6914.

* * * * *

102 MR. NOBLE: Now, with respect to the use of the trademark and tradename Waltham, on watches "Since 1956", respondents will stipulate that except for inventory disposals and other ingredients of the advertising policy of former management, the individual respondents named here; Ben Cole, Harry Aronson and Morris Draft, have been responsible for any advertising involving the use of the Waltham trademark, tradename on watches "Since 1956". With respect to the use of those trademarks and tradenames on clocks which were the subject matter of the complaint in Docket No. 7997 these respondents did not become responsible until after the merger of Hallmark, Inc. and Waltham of Delaware in 1959. That since 1959, the time of the merger of Hallmark, Inc. and Waltham of Delaware, these respondents individually named in this complaint, have been solely responsible for any advertising involving the use of the Waltham trademarks and tradenames on watches and clocks, or other products as

103 the officers and directors of the corporation owning the right to
use those trademarks and tradenames.

* * * * *

MR. NOBLE: These individual respondents will further stipulate that they will be bound by any final order entered in Docket No. 6914 including specifically Paragraph Two, Three and Four, so numbered, in the Commission's Order, provided, however, that in so stipulating these respondents, including the corporate respondent here in this action, do not intend to dilute their right to appeal the specific provisions referred to in that order 2, 3, and 4 as a matter of law, so that this stipulation then is intended to need that these individual respondents will be bound by any final order after appeal in No. 6914 or other disposition that may be made finalizing said order.

HEARING EXAMINER TOCKER: Well, my problem is framing of an order in this case and before hearing your last words I was going to ask you whether the purpose and intention of the stipulation up to that point was that stipulation intends to perform a factual basis for the entry of an order in this case similar to 2, 3, and 4 of Case No. 6914, subject,
104 however, to the reservation (a) that respondents do not thereby consent to the entry of that order and (b) that respondents reserve all rights to object to and appeal from that order as well as any order in this case and (c) that if, regardless of what case is appealed, the provisions of the order are modified, changed or vacated for the benefit of the respondents then in this case, even though this case may not be appealed, the order in this case shall be subject also to the same modifications of benefit for vacating which might have occurred in any other Waltham case.

* * * * *

MR. NOBLE: This is it exactly. The purpose and intent of the stipulation is to facilitate these hearings by dispensing with the necessity and requirement for evidence to form, in other words the factual basis for an order, should Your Honor feel that such an order is justified.

* * * * *

105

BEN COLE

resumed the stand and testified further as follows:

DIRECT EXAMINATION (Continued)

* * * * *

109

MR. NOBLE: If Your Honor please, if my stipulation on the record was not sufficient to cover this, and I submit that it was, I will stipulate further that any resevoil watches in evidence or in advertising of Waltham or Hallmark watches involving the use of resevoil in evidence are the responsibility of the individual respondents in this case.

* * * * *

BY MR. MIDDLETON:

Q. Now, referring to the cost sheet which is Commission's Exhibit No. 43, can you identify the retail price and the coded price in the catalog and on the cost sheet? A. Yes, I can.

110

Q. Will you do that for the record. A. Well, the watch was manufactured by the Waltham Watch Company in 1958.

Q. This is a Hallmark Watch? A. It is a Hallmark watch; yes. In 1958.

Q. I am referring now to the pricing. A. Yes. The retail price is \$95; the coded wholesale price is \$30.25.

Q. How is that reflected on that? A. It is printed on the sheet.

Q. Is it part of the other identification by number of the watch? What is the whole number that applied - that is that appears - A. The stock number is the coded wholesale price is on one line.

Q. Will you read that entire - A. Stock No. 2503 HK which denotes Hallmark, 3025 is the price, \$30.25.

Q. I see. And then right across that is the retail price? A. Yes, of \$95.

Q. Now, will you show those two prices on Commission's Exhibit No. 93, which is the cost sheet, and just describe how they appear on the cost sheet? A. On the cost sheet we have three columns; one indicating

111

our selling price of \$21.60, which is the price to the wholesaler;

the dealer's price which is \$30.25 is the price to the retailer. The retail price is \$95 at which the retailers sell the watch.

Q. Now the coded price, which one of those three prices is the coded price as it appears in the catalog? A. The one marked dealer's cost, \$30.25.

Q. The one marked dealer's cost.

* * * * *

113 Q. Mr. Cole, where are your movements made for the Waltham Watch Company? A. At present all of our movements are made in Switzerland.

* * * * *

114 A. Let's put it this way. We purchased a quantity of Waltham watches made in Waltham, Massachusetts in the latter part of 1956 through 1957, and, I believe, some in 1958.

Q. During this same period were any watches imported from Switzerland? A. Yes, they were.

Q. And this was done by Hallmark and under their licensing agreement? A. That is correct.

Q. Now, what is your operation with these imported watches in Chicago? A. We import the components, we purchase components manufactured in the United States.

Q. What components do you import? A. We import the movements and some watch cases.

Q. Sometimes known as heads; is that what you mean? A. And complete heads which is a movement and case.

Q. I see. Now the cases which you import what are - where do they come from? A. The cases will come from Switzerland, Hong Kong.

Q. Do you buy any cases locally? A. Yes. By "locally" do you mean in Chicago?

Q. In the United States. A. Yes, considerable amount.

115 Q. And from what firms do you purchase these watch cases?
A. The I. D. Watch Case Company.

Q. Do they import their watch cases to your knowledge? A. They import some, but the majority of the cases we purchase from them are made in the United States. From the Louis Gratz Watch Case Company.

Q. Are they domestic watch cases? A. Domestic watch cases entirely. The Latin Watch Case Company in New York.

Q. Are theirs domestic or foreign? A. Entirely domestic. Commodore Watch Case Company in New York; entirely domestic. That would be the majority of suppliers that we use.

Q. Have you purchased any from W. M. R. Watch Case Company? A. At times we have.

HEARING EXAMINER TOCKER: There is no foreign origin question in this case, Mr. Middleton, is there?

MR. MIDDLETON: I have all I want on that.

BY MR. MIDDLETON:

Q. Now, in connection with the operation, you acquired your watch cases from some domestic companies and you do import some of them. A. Yes.

116 Q. Now, the watch movements are imported separately. Now, what is your operation at your headquarters here in Chicago. A. Take the components; the movements, the cases, the bracelets, assemble them, adjust them, time them, and package them, and do any repair work necessary — by repair work, I mean the manufacturing adjustments to make the product a good one.

HEARING EXAMINER TOCKER: I want to correct the question I asked just a little awhile ago. The last Paragraph — Paragraph Seven, and the last line of Paragraph 8 does bring in the question of origin.

THE WITNESS: Did I answer your question, Mr. Middleton?

MR. MIDDLETON: Yes, that is fine.

BY MR. MIDDLETON:

Q. Will you give just a brief summary of your large customers beyond the State of Illinois just for the record. A. We sell our merchandise to wholesalers in the catalog field —

Q. Where would they be located principally? A. Well, practically every state of the Union. The West Coast, like Los Angeles, Seattle, New York City, Atlanta, Georgia; every major marketing area.

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Q. So your watches go throughout the nation? A. Yes, they do.

Q. Will you give an approximation of your annual sales for last calendar year for any — A. Watches only?

Q. Waltham; yes, in watches. A. In watches. About — let's say approximately \$6,000,000 in watches.

Q. Mr. Cole, I am going to hand you Commission's Exhibit No. 63, 64-A and -B, 65 and 66, which consists of the invoices and correspondence relating to a repair and complaint. I would like to know if that is more or less typical handling of a complaint problem. A. Mr. Middleton, this is a letter that we received from a customer, Mrs. James Buhr, and our invoice covering the replacement of a watch case.

Q. Now the burden of her letter initially was — had to do with the charge for whatever work was done on the watch; isn't that correct?

A. That is correct.

Q. And then her letter was in the nature of a complaint about the charge; isn't that correct? Under the guarantee policy? A. Yes.

118 Q. And I believe that the — I want you to look at the final invoice there as to the final disposition made of the case by Waltham? A. The charges were cancelled.

Q. The charges were cancelled? A. That is correct.

Q. That is a typical situation where a person writes in about a complaint. A. That is typical. It is to create good will for the company. If I might add knowing how some of our watches are handled this charge should have been paid, but it is our policy to bend over backwards.

HEARING EXAMINER TOCKER: The invoice never made a charge for replacement of the case, Mr. Cole. It says here "NC" for replaced case and the \$6.75 was paid for cleaning and oiling.

THE WITNESS: You are correct. That is right. I did not notice that.

May I see that again, please, sir.

(Document tendered.)

THE WITNESS: Mr. Middleton, I would like to alter that. I understand it better now.

We received a communication from Mrs. James Buhr in which she states that she purchased a watch about a year and a half ago and she
119 complains that the yellow gold on the case wore off and she does not complain about the operation of the movement. We then sent her a statement for \$6.75 which was an error on our part. We replaced the case no charge because she complained that the gold had worn off. She wrote again complaining about the charge and we then cancelled the charge. It probably got new repair personnel.

Q. Now, I hand you what has been marked as Commission's Exhibit No. 68. That seems to be a letter - transmitting a letter for Mrs. Caimi. A. That is correct.

Q. And here is an invoice Commission's Exhibit No. 67 apparently reflects no charge for repairs but charging for cleaning and oiling.

A. I can explain this. Our guarantee specifically states that we do not charge for replacing any parts, however, we do charge for the customary cleaning and oiling of a watch. This is stated on the guarantee. In this particular case we cleaned and regulated the movement and we placed a broken weight - I gather this is a self-winding watch - and the customary charge for cleaning and oiling a watch is \$7.75. They state "repair" "No Charge." What they meant was parts. Nevertheless they show it as repair, therefore, it is confusing. But we did not charge for the broken

120 weight. Had we charged for the broken weight, this could have easily been a \$10.75 or \$12 charge which any retail jeweler would have charged \$15 or \$20 for.

Q. Here is a letter for transmittal by Graves-Humphreys Company, Commission's Exhibit No. 70. A. That is one of our customers.

Mr. Middleton, the customer claims that the watch is in warranty, but obviously it wasn't, and they were charged \$6.75 plus 50 cents for obviously postage and handling which came to \$7.25.

Q. This is the invoice originally – that is perhaps the subsequent and here is a letter – I think that is Commission's Exhibit No. 69 and here is No. 70 and 71. A. Exhibit No. 71 is a letter from our customer, Graves-Humphreys, Inc., which they write in reference to our invoice for \$7.25, and they request an explanation of this invoice. They also state that if the watch has been abused and repairs were not in warranty they wanted to do the right thing and pay for the repairs.

Q. Now, I hand you what has been marked as Commission's Exhibit No. 28-A through -D and 28-A is the certificate of guarantee. Is
121 that the basic guarantee certificate that would have been involved in the correspondence that we have been referring to? A. Yes, it is.

HEARING EXAMINER TOCKER: I don't recall all those exhibits of the complaint letters. A little while back you said that cleaning and oiling is not included in the guarantee and that is correct. I just checked that myself. But I do recall a remark by Mr. Middleton yesterday that it is standard operating procedure to always clean and oil and to charge for – what do you say about that?

THE WITNESS: It has been the policy of the Waltham Watch Company and the Hallmark Watch Company that the customer must receive at least a full year's service from the watch before we will charge them for anything unless the watch was abused. In other words, if you purchased a watch, a Hallmark or a Waltham, and you had it nine months and the oil dried or a part got damaged we will repair it for no charge as standard procedure in order to build good will for the name. If the watch was abused – badly abused where the case is bent, dial is broken, watch smashed, we would then charge.

HEARING EXAMINER TOCKER: What about after 12 months. This is the remark that I was referring to.

122 THE WITNESS: After twelve months if a watch came in and there was no damage whatsoever; parts were all intact, the watch was dry, we would clean it, reoil it and charge them. However, if there were parts damaged we would replace them no charge. Many times the cost to us is

far greater than the charge we collect from repairing and cleaning and oiling.

BY MR. MIDDLETON:

Q. One thing I would like to get straight, Mr. Cole, relates to the identification of watches by year under their model numbers. A. Yes, that is the way we have them.

Q. Would you read for the record giving the Hallmark model numbers as succinctly as you can. A. I can do it this way: Hallmark Model Nos. 2300HK through 2359HK, this line came into existence approximately July 1, 1956.

Q. And how long did you repair them for? A. Usually for 12 months thereafter; after July 1, 1956.

Q. What happened after the end of 12 months? A. We then create a new line which is issued by means of another catalog sheet.

Q. Will you give us the catalog numbers for the succeeding years and the year that they are applicable. I think it would be best if you give
123 Hallmark first and come back and do the same thing for Waltham. We are now referring to Commission's Exhibit No. 99-A through 99-U. A. Hallmark stock Nos. 2380 through 2397 was issued January 1, 1957. This is called a spring line which has a very short life - usually about two or three months.

Hallmark stock Nos. 2400 through 2444 was issued, was issued in July of 1957.

Hallmark stock Nos. 2500 through 2538 was issued in July 1958. That is all of the Hallmarks.

Q. Now, will you do the same with respect to Waltham Watch, also referring to Commission's Exhibit 99-A. A. Stock Nos. 100 through 142 was issued in July, 1956.

Waltham Stock Nos. 180 through 197 was issued in January of 1957.

Waltham Stock Nos. 4200 through 4237 was issued in July, 1957.

Waltham Stock Nos. 4300 through 4336 issued in July, 1958.

Waltham Stock Nos. 4343 through 4388 was issued in July, 1958.

Waltham Stock Nos. 337 through 349 was issued January, 1959.

That is the end of the Walthams.

124 I don't think I missed any.

Q. I show you what has been marked as Commission's Exhibits Nos. 62-A through 62-Z-44, being a series of invoices for repair charges and ask you if those are the characteristic charges for the services. They are in the record and I just want to — A. These are characteristic of repair invoices.

MR. MIDDLETON: I don't think I have any further questions of this witness.

MR. NOBLE: May I take a couple of minutes. I don't think I have any questions, but I want to thumb through my notes and see if —

HEARING EXAMINER TOCKER: Off the record.

(Discussion off the record.)

HEARING EXAMINER TOCKER: On the record.

MR. MIDDLETON: I have no further questions.

MR. NOBLE: I have no questions of Mr. Cole. If I did have I would be calling him as my witness and I just as soon not do that now.

(Witness excused.)

HEARING EXAMINER TOCKER: All right. Do you have a witness for this afternoon, Mr. Middleton?

MR. MIDDLETON: No, sir.

MR. NOBLE: May I state for the record that the stipulations that counsel and I have entered into this morning unquestionably dispensed
125 with the requirement of calling a number of witnesses.

I suggest that we recess until tomorrow morning at 10 o'clock at which time I will either advise Your Honor that we are unable to do it at this time or proceed with so much as I am able to pull together this afternoon.

HEARING EXAMINER TOCKER: All right. It should be understood that there is no compulsion intended and it would have to be with the understanding that an agreement on the part of you gentlemen that the fact

that any such defense is put in does not prejudice the right of the respondents to move or dismiss any part of the case not otherwise stipulated depending on what may develop at the time the Commission counsel rests.

MR. NOBLE: That is right.

* * * *

132

August 13, 1962.

* * * *

133

ROBERT KRITZIK

was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

HEARING EXAMINER TOCKER: Will you please give the reporter your full name, your address, and also your business address.

THE WITNESS: My name is Robert Kritzik, and my local address here is 7810 North Beach Drive. My business address is 207 North Milwaukee Street, and I am a vice-president of General Merchandise Company.

* * * *

135

BY MR. MIDDLETON:

Q. Now, you referred to yourself as a wholesale company, and you are referring to the distribution of your catalog -- the mail order catalog? In other words, it has always been a mail order catalog business, has it not? A. That is correct.

* * * *

139

Q. Mr. Kritzik, referring to that document now, and by referring to it, sir, can you state what the volume of sales of Waltham watches were

140

for the months of October, November and December of 1958?

* * * *

A. I would imagine that in October of 1958 that it is reasonable that we should have done about \$15,000 worth of business; in November of 1958, approximately \$20,000 worth of business, and in December of 1958, approximately \$65,000 worth of business.

Q. Now, with reference to the same information for the months of October, November and December, of 1959, after refreshing your recollection, can you give us those approximate figures? A. In October of

141 1959, it is reasonable that we did \$13,000 worth of business; in November of 1959, it is reasonable that we did \$30,000 worth of business, and in December of 1959, it is reasonable that we did \$47,000 worth of business.

* * * * *

Q. Mr. Kritzik, with respect to the advertising of the Waltham watches in your catalog, will you describe the manner in which the sheets were prepared — the catalog sheets, the manner in which they were prepared. A. This is in regard to 1958, and at that time the art work and the general copy, describing the watches, was prepared by Waltham and Hallmark. They, I am sure, in this year of 1958, made arrangements for the printing of those sheets of paper, and they consulted with our department manager, in charge of jewelry, asking him for stock numbers which would relate to each specific item being sold in here, and they advised him of his cost, the selling cost and the retail cost, you see, which would appear on each of these items.

* * * * *

145 Q. There are three columns of figures on Commission's Exhibit 101-A and 101-B, and the first is captioned "Your Cost", and the second one is under the heading of "Dealer's Price" and the third column is entitled "Resale Price".

Will you identify those figures and their meaning on the record, sir, beginning with "Your Cost"? A. The column headed "Your Cost" is the price at which we purchase these watches subject to whatever additional discount for prompt payment might be involved.

The column headed "Dealer's Price" is the price which we sell the watch for.

Q. How is that price indicated in your catalog? A. It is indicated in a code, right after our stock number, and the period which separates the cents from the dollars we have left out.

Under the column headed "Retail Price", that is identified in our catalog as "Retail" and it is shown quite clearly.

146 Q. I will refer you to Commission's Exhibit 96-A, on pages Z-8 through 11, and ask you if these are the same or if you can identify those -- not the specific figure, because the catalog sheet is for 1958 or 1959.

A. That has the same art work and the same general copy as that which appeared in our catalog.

* * * * *

Q. Will you give us a statement as to what figure constitutes the stock number and what figure constitutes the coded price and the retail price? A. All right, there is a number on here of 4300W, and by referring to this 1959 sheet, which is actually not applicable, but I will assume then that the number of 4300W is Hallmark's stock number for their own records.

Following that there is 6325, and by referring to my own catalog, I see that 6325 indicates the price at which we sold that particular watch.

Then there is a number of 175.00 and that is identical in both sheets, and therefore is properly identified this as the retail in both places. That is the retail price suggested to the purchaser.

147 Q. Now, all of your sales are made at the price identified as the "Your Cost" price? A. Yes, sir.

MR. NOBLE: If Your Honor please, at this point, in order to avoid multiplicity of this testimony, the Respondent will stipulate that their catalog customers -- all of their catalog customers will print, or include in their catalogs each year, a Waltham and/or a Hallmark insert consisting of a number of pages, usually in color, showing a different style and model of Waltham or Hallmark watches, and in the representation or advertisement describing each model or style shown, the coded price will always be a style number or model number plus the dealer's cost, or the cost at which Waltham's specific customer will sell in the catalog business.

The suggested retail is Waltham's suggested retail price, with respect to our catalogs and all catalog inserts in evidence.

* * * * *

150 BY MR. MIDDLETON:

Q. There is one question I would like to ask you, Mr. Kritzik, with respect to the catalog that you brought with you, and which you are now examining.

Where, in there, are instructions for locating the actual price to be paid by the user of the catalog?

* * * * *

151 THE WITNESS: All right, I think I can answer that by saying that in this particular catalog, on page 712, there is a great big document that shows you how to find out your cost.

BY MR. MIDDLETON:

Q. And it identifies the coded price? A. Precisely.

Q. For the customer? A. That is right.

Q. And that appears approximately whereabouts in the back of the
152 catalog? A. That is in the back of the catalog, facing the order blanks.

* * * * *

156 CROSS-EXAMINATION

BY MR. NOBLE:

* * * * *

159 Q. You just have that one price for customers? A. That is right.

Q. And it is always coded in your catalog? A. That is correct.

Q. And that is true with reference to all products as well as watches?

A. Yes, sir.

Q. Your customer can only realize a profit if he marks up above the coded price, having to do with the suggested retail - A. (Interposing)

160 To answer your question directly, our customer, when he buys any product in our catalog, buys at the coded price plus the transportation costs. This then becomes his landed cost at his place of business.

Any price at which he wants to sell, over and above that landed cost, is his profit.

If he wants to take full advantage of a large spread or a small spread, between his cost price and his resale price, that is his business.

* * * * *

165 Q. But you only sold to them at the coded price? A. Only at the
coded price.

* * * * *

166 THE WITNESS: Did our company sell to consumers, well - well,
167 the answer is apparently there were consumers on our mailing list.

* * * * *

179 ROBERT KRITZIK

now being called as a witness by and on behalf of the Respondent, and
having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NOBLE:

Q. During the years 1958 and 1959, what percentage of your com-
pany's business was on open account, approximately? A. The approxi-
mation would be 45 per cent.

Q. And of that 45 per cent, what percentage would be to industrials?
A. More than one-half.

180 Q. And the balance would be to what type of customer? A. Retail
customers - retailers, people in business selling merchandise.

* * * * *

Q. And what type of customers were they? A. They were retailers
who would not qualify for open account, or industrial accounts that would
not qualify for open account, and retailers who preferred to send in a check
with the order, or industrials who preferred to send in a check with the
order, and obviously consumers who were in no business whatsoever.

181 Q. You said "obviously", and why do you say "Obviously"? A. From
my recollection of the business during those years, as I studied the orders
coming in from customers, there were many that came in in a scrawled
handwriting of a person who did not appear to have a business connection.
These appeared to me to be definitely consumer orders.

As a matter of fact, at Oak Ridge, Tennessee, I believe it is, our
Government had a big atomic project going on down there, and there was
a shortage of retailers in that area, so our catalog was apparently the

most popular book in the area because we had something like over 1,000 customers just from Oak Ridge, Tennessee alone, and I know there weren't 1,000 retailers or industrial accounts down there.

These were Government employees that were buying from us, so that is where I come up with my "obvious" answer.

Q. Are you able to give us the information, based upon your recollection, approximately during the years 1958 and 1959, as to what percentage of the 55 per cent left, on a cash basis of your company's customers, were consumers? A. We are now talking about a percentage of the 55 per cent?

182 Q. Yes. A. I would say 75 per cent, or thereabouts. I would say that 75 per cent of the 55 per cent were consumers.

Q. All of your customers buy at what price? A. All of our customers buy at the coded price in the catalog.

Q. Now, in the light of your earlier testimony that your company is a wholesaler, a distributor of Waltham watches, can you explain the presence of 75 per cent of 55 per cent of your total customers being consumers? A. That explanation, I believe, comes as follows: We went out or sent out to the various types of retailers - we sent to retailers an invitation inviting them to request our catalog. If the retailer wasn't interested in our catalog, or perhaps already had a catalog, he might give this to a friend or it might be given to a friend over the back fence or a housewife might give it to another housewife, and those people would then write in for the catalog, using the form that was made out and then he would be set down as a consumer on the mailing list.

MR. NOBLE: I have no further questions.

HEARING EXAMINER TOCKER: Mr. Middleton?

CROSS-EXAMINATION

183 BY MR. MIDDLETON:

Q. During that period, Mr. Kritzik, how many catalogs did you distribute? A. It was over 500,000 and under 1,000,000.

* * * * *

185 HEARING EXAMINER TOCKER: In other words, supposing one of these housewives, over the fence, one of those that you mentioned, had made a purchase in 1958, sir, would she then get a catalog in 1959 without the two dollars?

THE WITNESS: Providing she had bought more than one order or spent more than twenty dollars on any one purchase, I mean. That was an involved system in trying to isolate these customers that were worthwhile, and trying to send this two-dollar catalog out to them.

* * * * *

188 EDWARD C. GERICKE

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

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195 HEARING EXAMINER TOCKER: I am going to interrupt here for just a moment.

196 Mr. Noble, it appears that with respect to Smith Corporation or the Smith Supply Company, Waltham actually printed the inserts and sent them to the Smith catalog maker. I somehow got the impression from the prior witness' testimony that this was not the practice; and was it the practice, or was it not?

MR. NOBLE: I think it was the same.

HEARING EXAMINER TOCKER: The same?

* * * * *

MR. NOBLE: I will stipulate for the respondents that this witness' company, the Smith Supply Company, during the pertinent years 1958, 1959 and 1960, printed in its catalog certain insert pages which were furnished to them by the Waltham Watch Company, on which pages appear model numbers with pictures of Waltham watches and Hallmark watches, under each of which there would be an advertisement or representation; that in such advertisement or representation, in each case, the coded price appears after the last four digits after the last letter of

an alphabet appearing in the style number; that this witness' company always sells at the coded price, and that included with the representation

197 under each such model on certain insertions is a manufacturer's suggested retail price printed to so indicate. These insertions were furnished to the Smith Supply Company during the years in question by the Waltham Watch Company, and they would differ from the inserts of other suppliers, such as the General Merchandise Company, a witness from which testified earlier today, only with respect to the style number or model number included in the coding.

* * * * *

MR. NOBLE: I will further then stipulate that the coded price on a given year, for any given model number of the Waltham Watch Company and the Hallmark Watch Company would be the same with respect to all suppliers, or at least with respect to the Smith Supply Company and the General Merchandise Company, and I will also say, "all suppliers," un-

198 less it should turn out that one witness should be called later who has a separate coding system.

* * * * *

202 MR. NOBLE: I will stipulate further that the Smith Supply Company always sells Waltham watches at its coded price, and, therefore, the price at which the invoices indicate sales would be the total price.

* * * * *

203 BY MR. MIDDLETON:

Q. Can you tell me if they have substantial trade in those watches during that period? A. We did good business.

Q. In each of those years? A. Yes.

Q. Do you have a walk-in trade of any kind in connection with your —
A. (Interposing) A small one.

Q. Where is that located? A. 170 South Second Street.

Q. At what price do you sell your products in that store? A. At the coded prices.

Q. Those are sold to consumer customers? A. Well, it depends on how you identify a consumer.

* * * * *

A. * * * We didn't have a copy of our floor consumer orders,
 but each of them had a stipulation which the customer signed, saying that
 204 it was from an industrial company and for use as a prize or pre-
 mium or incentive.

* * * * *

208

CROSS-EXAMINATION

BY MR. NOBLE:

* * * * *

210 Q. What kind of a business is the Smith Supply Company? A. We
 are a wholesale mail-order distributor.

Q. Do you sell for resale? A. Yes.

Q. Did you not sell to consumers?

* * * * *

A. I don't think there is a wholesale business in the world who
 doesn't sell to some consumers irregardless of the nature of the busi-
 ness they are in.

* * * * *

214

REDIRECT EXAMINATION

BY MR. MIDDLETON:

* * * * *

215 Q. And anyone who sent cash in with an order, sir, would have the
 order filled? A. In all probability, yes.

Q. Regardless of whether it was a company or — A. (Interposing)
 It's possible.

Q. (Continuing) — or someone buying in his own name? A. It's
 possible.

* * * * *

228

BENJAMIN W. HEALD

called as a witness on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

HEARING EXAMINER TOCKER: Would you please give your full name and address to the reporter?

229

THE WITNESS: My name is Benjamin W. Heald. I am executive secretary of the Wisconsin Retail Jewelers Association, and secretary of the Wisconsin Board of Examiners in Watchmaking. This is a State licensing board.

* * * * *

231

BY MR. NOBLE:

Q. Of your membership sir, do you know what their price policy is with respect to the manufacturer's ticketed price, generally, in your association? A. I think I do. Generally, the retail jeweler sells for about a 50-per-cent markup.

* * * * *

232

Q. In your opinion, the mark-up, I believe you said, was 50 per cent? A. That is generally true with most jewelry items.

Q. Including watches? A. That is right.

Q. Fifty per cent above their cost? A. No, it is fifty per cent over the retail price.

Q. I don't quite understand you. You say the mark-up is 50 per cent of the retail price? A. That is right, 50 per cent of the retail, so it actually is a 100-per-cent markup, which is another way of putting it, in general.

Q. In other words, the general mark-up in the retail jewelry business, in Wisconsin, at least, is 100 per cent above cost? A. I think that is generally true.

Q. Is that generally true? A. Yes.

* * * * *

233 Q. And as a result of your attendance of those meetings and talk-
 234 ing to representatives of the State associations similar to yours
 throughout the country, can you tell us whether or not the practice of
 the industry, with respect to mark-up, is generally the same as it is,
 according to your testimony, here in Wisconsin? A. I think it is gen-
 erally true in the United States.

Q. The general practice of the retail jewelers is to mark-up 100
 per cent above their cost? A. That is correct.

* * * * *

236 HEARING EXAMINER TOCKER: Have you made any observations
 with respect to watches, in particular, when the pre-ticketing price ex-
 ceeds the price which would be arrived at by using the 100-per-cent-
 mark-up formula?

THE WITNESS: Well, sir, my experience is among those with
 which I have had some experience, and I think supported by the history
 of a number of watch lines where the prices were excessively pre-ticket-
 ed, and by the same standard, I have seen it where those particular watch
 lines have disappeared from the retail jeweler's store.

* * * * *

HEARING EXAMINER TOCKER: Or would they leave the ticket
 on, and sell it by whatever price they arrived at by using the 100-per-
 cent mark-up?

THE WITNESS: It is generally left on, and they would just say that
 this is the price and that this was my price, and they sold it at this price.

* * * * *

CROSS-EXAMINATION

237 BY MR. MIDDLETON:

Q. With respect to some of the watches or the brands of watches
 that have disappeared from your members' shelves because of excessive
 pricing that you mentioned, do you know of any specific brand of watch?

A. Yes, I know several brands of watches.

Q. Is Waltham one of those watches? A. It is. I myself once

sold Waltham watches years ago when I had a retail store, and discounted them.

Q. Was there any other basis for your discounting them, besides the excessive price-tagging? A. No.

MR. MIDDLETON: I have no further questions.

REDIRECT EXAMINATION

BY MR. NOBLE:

* * * * *

239 Q. Isn't it a fact that Waltham wasn't in the watch business in 1952? A. That I don't know, but — that I wouldn't know by the years, but I know they went through an unpleasant experience, shall we say, and re-organized, and I do know that during the re-organization it was still the original Waltham Watch Company, and it was disposing of their watches by the excessive pre-ticket with a fictitious bargain which was based thereon in the stores throughout the territory.

* * * * *

247 August 14, 1962.

* * * * *

248 BEVERLY ANN McCORD

was thereupon called as a witness for the Commission, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MIDDLETON:

* * * * *

250 Q. Mrs. McCord, did there come a time when you had either of those watches repaired? A. Yes.

Q. Will you relate what occurred at that time? A. Well, I don't know the exact time, but it was within the purchase of the watch, but the
251 watch stopped running, so we sent it into the company with the life-time guarantee, with the guarantee for repairs.

* * * * *

A. (Continuing) We sent it into the company for repairs, along with the guarantee.

It was repaired and returned to us with a bill for \$6.00 and some odd cents, I'm not sure of the exact amount, but I know it was over \$6.00, and then there was a charge of \$1.00 for handling charges on the bill that we received from the company.

Q. When did you first find out that there was to be a charge of any kind for this watch for the repairs on the guarantee? A. Well, I am not sure. I know it was after we sent it in for repairs, because before then I was under the impression that it was guaranteed to be repaired should anything go wrong with this watch.

Q. When did you send the \$1.00 in? A. I think that went along with the watch. I think that was on the guarantee.

Q. Now, did you then find out that there was to be this \$1.00 charge?

252 A. Well, after I purchased the watch, I did, after I had it, yes.

* * * * *

CROSS - EXAMINATION

BY MR. NOBLE:

* * * * *

254 Q. You paid the coded price for the watch, did you? A. Yes.

Well, not actually, because it was listed in the catalog as \$15.95, and

255 then I sent in the order stating that it was listed as such, and they sent back the order with the watches, with this price crossed off, and the \$13.99 was indicated in red.

Q. You bought it at less than the price it was shown to be in the catalog? A. Yes.

Q. Was it your understanding that you were obtaining a discount? A. Yes.

Q. Did you, in fact, obtain such a discount? A. Well, not as it resulted, I don't think I did, but at the time of the purchase, I assumed that the two different prices were what I was getting and what I was paying for it.

Q. Well, isn't that what happened? A. No, I don't think I received a watch worth what it was listed for in the catalog.

Q. Do you know of anybody that bought the watch at retail? A. I don't understand your question.

Q. There were two prices listed in the catalog? A. Yes.

Q. A retail - a suggested retail price? A. Yes.

256 Q. You did not pay that? A. That is correct.

Q. You paid a coded price which you understood was a wholesale price? A. Yes.

Q. Do you know of any body that paid the suggested retail price?
A. No.

* * * * *

261 Q. But you have read the guarantee certificate? A. Yes.

Q. And you understood what it said? There was nothing difficult about the language in that certificate, was there? A. No.

Q. It was a simple and plain language, am I not correct? A. Yes.

Q. You knew at the time that you read it that there would be \$1.00 service charge, didn't you? A. That was after I received the watch, yes.

* * * * *

262 Q. Did you ask to see the guarantee at the time you bought the watch? A. I purchased it by mail and it was guaranteed. It was not only guaranteed, but there was a statement of the guarantee that was listed.

Q. In the catalog? A. Yes, in the catalog.

Q. And this you read? A. Yes.

* * * * *

265

REDIRECT EXAMINATION

BY MR. MIDDLETON:

Q. Mrs. McCord, when you purchased the watch from the catalog, you compared the ticketed price with the coded price, is that right?
A. Yes.

Q. And you felt that you were getting some savings between those two prices? A. Yes.

266 Q. And you relied upon the guarantee representation that appeared
in the catalog, is that right? A. Yes.

* * * * *

271 ALOYS HEBGEN

was thereupon called as a witness for the Commission, and having been
first duly sworn, testified as follows:

DIRECT EXAMINATION

HEARING EXAMINER TOCKER: Would you give the reporter your
full name and address, please?

THE WITNESS: Aloys Hebgen, Highland, Wisconsin.

BY MR. MIDDLETON:

Q. What is your occupation? A. Well, right at the present time,
I am tending bar for my regular occupation.

Q. How long have you been doing that?

HEARING EXAMINER TOCKER: I don't believe the witness com-
pleted his sentence.

Would you continue, Mr. Witness?

THE WITNESS: Well, my regular occupation actually is that of a
carpenter. I'm tending bar now, but my regular occupation is a carpenter.

BY MR. MIDDLETON:

Q. How long have you been tending bar on this particular job?

A. Since last October.

Q. What were you doing before then? A. I was a carpenter.

272 Q. You were a carpenter? A. Uh huh.

Q. Where were you employed as a carpenter at that time?

A. Well, I was employed at the Owens-King Lumber Company at Dodge-
ville. At that time, of course, I was employed there for about six weeks,
and then I got a heart attack and I had to take things easy, so that's why
I am tending bar now.

Q. Did there come a time when you purchased a Waltham watch?

A. Yes.

Q. Tell me from whom you purchased it. A. Well, it was from

a friend of mine who got it for me. He had the catalog, so it was the friend of mine who got it for me.

Q. But you got it through a catalog? A. Yes.

Q. Do you know the name of the catalog company? A. Yes, I think it was the Harrison Company.

Q. The Harrison Wholesale Company? A. Yes.

Q. I show you what has been marked as Commission's Exhibit 96-Z-11, and ask you if you can identify the watch that you purchased.

273 A. That there is the one.

Q. What is the number of that watch, or can you identify it by the number? A. You mean this whole number here?

Q. Yes, just the first four numbers. A. 4338.

Q. What is the coded price that appears there? A. The coded price would be \$24.45.

Q. What is the ticketed price or the retail price? A. \$71.50.

Q. Now, when you purchased this watch, how much did you pay for it?

MR. NOBLE: I will object, Your Honor, because the witness did not purchase the watch from a catalog. He purchased it, I think he testified, from a friend of his.

HEARING EXAMINER TOCKER: The objection will be overruled. The witness testified that he purchased the watch from a catalog through a friend.

BY MR. MIDDLETON:

Q. What did you pay for the watch? A. Well, approximately \$27.00. I can't say exactly anymore what it was, because I just don't remember the exact price.

274 Q. How long ago was that? A. It would be about five years ago, or right around in that neighborhood somewhere.

Q. I refer you to Commission's Exhibit 96-Z-8, and refer you to the language up here on the guarantee, and did you rely upon that guarantee at the time you made the purchase? A. Well, I figure that it was

guaranteed — yeah, sure, I thought the watch was guaranteed for life when I read that, yes.

Q. Did there come a time when you had occasion to send the watch in for repairs under that guarantee? A. Yes, I did.

Q. Will you tell us what happened? A. Well, I sent the watch in. It wasn't coming back, and it wasn't coming back, and it wasn't coming back, so I wrote them again, and I asked them what was the matter — why I wasn't getting my watch back, and they said that I would have to send them the money for the repairs before they would forward it to me.

Q. How much did they request that you send? A. Somewhere in the neighborhood of between seven and ten dollars. I think it was seven dollars, as well as I can recall right now. I don't remember exactly.

275 Q. Did you see the guarantee certificate? A. Well, I looked at it afterwards, yes.

Q. That was after you purchased the watch? A. That was after I got the watch back from having it fixed.

Q. Now, referring you to Commission's Exhibit 96-Z-6, I will ask you if that looks like the guarantee certificate that you had? A. Yes, it looks like the same duplicate of the certificate.

Q. It looks like the certificate, or it looks like a duplicate of the original? A. The same original one, yes.

MR. MIDDLETON: I have no further questions.

CROSS-EXAMINATION

BY MR. NOBLE:

Q. What was your friend's name through whom you bought your watch? A. Well, it was Joe Egan.

Q. Did he have a catalog? A. Well, he had the catalog, but I don't know whether it was his own or not.

Q. Did he show it to you? A. Yes, sure, we picked it up.

Q. Oh, and you looked at it? A. What?

276 Q. Did you look at the catalog? A. Yeah.

Q. And you bought from a catalog? A. Yeah.

Q. Your answer is yes, is that it? A. Yes.

Q. Did you buy in his name? A. No.

Q. You signed the order slip yourself? A. Yeah, myself.

MR. NOBLE: No further questions.

MR. MIDDLETON: I have no further questions.

HEARING EXAMINER TOCKER: You bought the watch in your own name? You ordered it in your own name?

THE WITNESS: Yes.

BY MR. NOBLE:

Q. Have you got the watch on you? A. Yeah.

Q. Can I see it? A. Well, it needs repairing now again. The stem breaks on it if you try winding it, and if you would try winding it now, you would see that for yourself. It won't completely run.

Q. That is a pocket watch? A. Yes.

277 Q. It keeps pretty good time, doesn't it? A. Yeah, it keeps good time.

MR. NOBLE: No further questions.

REDIRECT EXAMINATION

BY MR. MIDDLETON:

Q. Mr. Hebgen, does your watch work as well now as it did when you first got it? A. Well, the watch works pretty well. It works all right, yeah.

As far as the movement was concerned, that was all right. Outside of the stem - well, what happens, it - well, the cogs in the stem would break, and I can't wind it up, you see.

Q. Had that problem occurred to you before? Had that occurred before you had the repairs made to this watch? A. Well, that was what was wrong with it when I had it repaired.

Q. Is that what is wrong with it now? A. That's what's wrong with it now, yes.

Q. Do you recall whether they charged you for repairing the watch or for cleaning and oiling? A. Well, it was for repairs.

Q. It was for repairing the watch, as far as you know? A. Yeah.

278 MR. MIDDLETON: I have no further questions.

HEARING EXAMINER TOCKER: You said something about the stem which I did not catch. I didn't catch the word that you used, and what did you say about it?

THE WITNESS: The cogs in the stem, when you wind it up, they slip, and you can't wind it.

HEARING EXAMINER TOCKER: The cogs?

THE WITNESS: Yes.

HEARING EXAMINER TOCKER: Thank you, Mr. Hebgen, and you are excused.

(Witness excused.)

* * * * *

RUTH BACHMAN

was thereupon called as a witness by and on behalf of the Commission, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

* * * * *

279 BY MR. MIDDLETON:

Q. Did you have occasion to purchase a Hallmark watch? A. Yes, two of them, in fact.

Q. I will show you what has been marked here as Commission's Exhibit 96-Z-5, and ask you if you can identify one of the watches that you purchased? A. Yes, this is the one.

* * * * *

Q. Now, Mrs. Bachman, can you identify the amount of the price that you paid in this catalog? A. At the time I got it, it was right around \$21.00, with the postage and everything.

Q. And what is the retail price of the watch? A. Well, right around 18 or 19 dollars.

280 Q. The retail price? A. Oh, that would be the coded price. Well, I don't remember what the retail price was, but I would say around 56 or 60 dollars, somewhere along in there.

* * * * *

Q. Mrs. Bachman, did you have occasion to buy another watch at a later date? A. Yes. Well, I bought it for my father's Christmas the next year.

* * * * *

281 Q. What is the coded price of that watch? A. You mean this one?

Q. Yes, the one we are talking about. A. \$18.95.

Q. What is the retail price as shown in this catalog? A. \$59.50.

* * * * *

284 CROSS-EXAMINATION

BY MR. NOBLE:

* * * * *

285 Q. So you never had any complaint about that first watch?

A. Nothing other than I couldn't figure out when the guarantee was to be a lifetime guarantee, you know, why I would have to pay \$8.50 two months later for the thing, or for the watch.

* * * * *

286 HEARING EXAMINER TOCKER: Mrs. Bachman, you have been talking this morning about a guarantee, and when is the first time that such a thing as a guarantee entered your mind with respect to the watch that you have been talking about?

THE WITNESS: Well, when I was looking through the catalog, I see on there where it said, "Lifetime Guarantee," so you figure then that you are getting what should be a better watch, if it has such a guarantee with it.

HEARING EXAMINER TOCKER: You saw that before you got the certificate, because I believe you did mention the certificate?

Did you see that catalog before the certificate, or after you got the certificate?

THE WITNESS: You mean the certificate that came with the watch?

HEARING EXAMINER TOCKER: Yes, you exhibited a certificate which you said was the same one as the one in the book.

287 THE WITNESS: Yes. Well, I seen it in the book, but I don't think that it reads just the same as the certificate that came with the watch.

MR. MIDDLETON: May I clarify something?

HEARING EXAMINER TOCKER: You may.

MR. MIDDLETON: The certificate in that folder is separate from the one in the catalog.

HEARING EXAMINER TOCKER: Well, let's find out what she saw in the book as it is here.

THE WITNESS: Yes, this is what it had on it. It said, "Lifetime Guarantee."

HEARING EXAMINER TOCKER: Is that your best recollection of what it said?

THE WITNESS: Yes, that is it.

HEARING EXAMINER TOCKER: Was there anything said about a charge of one dollar?

THE WITNESS: Not that I remember of then.

HEARING EXAMINER TOCKER: When is the first time you learned about the one-dollar charge?

THE WITNESS: When the watch went back, I think, because I think that is when I started reading over the papers to find out where I was supposed to send it, and then I saw that there was a one-dollar charge when I was reading over the guarantee.

289

August 16, 1962.

297

ALBERT HARRELL

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MIDDLETON:

298

Q. Did you pick the watch out from a catalog? A. Yes, I picked it out from a catalog.

Q. Do you remember the catalog sheet that you purchased this from. Do you remember whether you - what price you paid for it?

A. Well, I think it was listed – coded, you know; the catalog number was the price number, and, I think, it was around \$15.95.

Q. What did it actually cost you? A. That is the cost. You know in the code – wholesale price.

Q. Was there another price shown as the retail price? A. Yes, it said list \$54.95 – retail list.

* * * * *

304

VINCENT T. LORIMER

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MIDDLETON:

* * * * *

Q. Who are you employed by? A. Erickson Petroleum and World Wide.

* * * * *

305

Q. How does World Wide operate? A. World Wide operates a mail order house – wholesale mail order house and sells chiefly through catalogs.

* * * * *

306

Q. Does Erickson maintain a World Wide catalog distributed through Erickson's filling stations? A. Right. And catalog merchandise may be ordered at the station. Order is filled and the sale is for World Wide.

Q. Can any gasoline customer or any other person coming to the station utilize the catalog? A. Right.

Q. Is the catalog on display for their use? A. Yes, sir.

* * * * *

307

Q. Do you know at what price – again looking at the catalog sheet – can you tell me what price the customer would pay for the product? A. Yes, this is a coded price.

Q. They would pay the coded price? A. Right.

* * * * *

308

REDIRECT EXAMINATION

BY MR. MIDDLETON:

* * * * *

Q. So to that extent World Wide utilizes its facilities – the facilities
309 of Erickson's to sell to consumer trade? A. Right.

* * * * *

313 MR. MIDDLETON: When sales are made over the counter like this,
what price is paid by the purchaser of the product?

THE WITNESS: I am not in merchandising but I believe that that is
the – that is generally the coded price.

* * * * *

315

CECIL BODIN

was thereupon called as a witness for the Commission and, having been
first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MIDDLETON:

* * * * *

316 Q. What kind of watch did you purchase? A. Waltham.

* * * * *

Q. Do you recall what you gave for this watch? A. No, but it
was \$45 – I think it was around \$48 with tax and stuff.

Q. Do you recall whether it had a price tag in the box? A. Yes,
\$120.

* * * * *

321

August 17, 1962.

* * * * *

322

ORVILLE C. BOLTER

was thereupon called as a witness for the Commission and, having been
first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MIDDLETON:

* * * * *

323 Q. You are strictly an employee of Erickson's; is that right?
A. Right.

Q. Do you have occasion to sell products through catalogs? A. Yes.

Q. What is the name of the catalog? A. World Wide.

Q. Do you carry some of these products in your store? A. Yes,
we do.

Q. Have you carried Hallmark watches? A. Yes.

324 Q. Now, Mr. Bolter, when a person utilizes the catalog in your
store, do they have the right to — the privilege of going through the
catalog and picking out what they want? A. Yes, they do.

* * * * *

329 FRANK WESLEY WELDON

was thereupon called as a witness for the Commission and, having been
first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MIDDLETON:

* * * * *

330 Q. What kind of business are you in, Mr. Weldon? A. It is the
Coast-to-Coast hardware business.

Q. Have you had occasion to handle the Waltham or Hallmark
watches? A. A few — very little.

Q. Have you had occasion to buy one — buy a Waltham watch?
A. Yes.

Q. Do you recall approximately when you purchased this watch?
A. If I was to say about 1957, that would be about right.

Q. Now, in making this purchase will you state how you went about
making the purchase? A. I ordered the watch through Coast-to-Coast
stores through what they call the Central Organization. They sent in the
watch — or sent in the order and the watch comes back to my store.

Q. Did you have the use of a catalog sheet? A. Yes, sir.

* * * * *

331 Q. Did you pay the retail price that appears in that catalog sheet?
A. No.

Q. How did you arrive at your price? A. It is coded. Just before

the retail price there is a coded there and tells us what we pay for it.

Q. And that is the price you paid for this watch? A. Yes, sir.

* * * * *

332

ARTHUR JOHN

was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

333

DIRECT EXAMINATION

BY MR. MIDDLETON:

* * * * *

334

Q. Have you ever purchased a watch by the use of this catalog sheet? A. Yes, I have.

Q. What kind of a watch? A. Do you mean in the Waltham line or in -- in the Waltham line we have purchased Waltham watches.

* * * * *

336

CROSS EXAMINATION

BY MR. NOBLE:

* * * * *

337

Q. Well, the coded price is your cost as a wholesaler? A. Yes, that is right.

Q. And you bought it 10 percent less than that? A. That is what I say, I don't remember if it is 10 percent less than what is shown there or not, but maybe it is, that I don't remember. I don't do this very often so I don't remember the facts on it.

* * * * *

338

Q. You bought it at 10 percent less than that? A. Yes. It must be because we got it at \$44.64 which I didn't know that we get 10 percent less than that.

* * * * *

339

Q. At any rate you bought those at wholesale? A. At wholesale price. Everything is wholesale.

* * * * *

341

EDWARD ANDRES

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MIDDLETON:

* * * * *

Q. What is your relationship with the Coast-to-Coast Company?

A. Well, we are a franchised store. They have hundreds of them like that and we own what we have in our store, but we buy through Coast-to-Coast and we get in on their, you might say, advertising program that way.

* * * * *

342 Q. When a customer wants to purchase a Waltham watch, how does he select this item that he is going to buy? A. From these order sheets that we have from the Waltham Company or Coast-to-Coast. We get them from Coast-to-Coast, Central Organization of Coast-to-Coast.

* * * * *

343 Q. Do you show this catalog sheet to your customer when they want to order a watch? A. Yes, we do.

Q. Have you had occasion to buy a watch for yourself? A. Yes, I have.

* * * * *

344 Q. What price did you pay for the watch; that is, I am asking you the generic term here. Did you pay the coded price or the retail price that appears in the sheet that you have in your hand? A. We paid the coded price for them.

Q. These were all used by you personally? A. Yes.

* * * * *

347

PHILIP BAUMANN

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MIDDLETON:

* * * * *

348

Q. In the course of your business in handling the catalog products do you sell — had occasion to sell watches? A. Very much so, yes.

Q. Do you sell Hallmark watches? A. Yes, I do.

Q. Have you sold Waltham watches? A. Yes, I do.

Q. Have you had much trade in these watches? A. Yes, I have quite a heavy trade on them since I do carry them in the station also.

* * * * *

Q. Now, do you have a catalog in your place of business? A. Yes, I do.

Q. Is this available to the consumer? A. Yes, it is.

Q. Does it have catalog sheets in there for Waltham watches?

A. Yes, it does.

Q. Does it have one for Hallmark? A. Yes.

* * * * *

349

Q. When you sell to your customer, at what price do you sell?

A. I sell at the coded price.

Q. You sell at the coded price? A. That is correct.

Q. Did you ever sell it at the ticketed price, at the so-called retail price? A. No, I don't.

Q. But you do sell consistently at the coded price? A. That is correct.

Q. This is regardless of how you purchased the watch, whether it comes in as a — whether it is carried in stock or whether it is sold by customers ordering through the catalog? A. I always sell by the coded price.

* * * * *

353

EDWARD ANDRES

was thereupon called as a witness for the Respondent and, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. NOBLE:

Q. Mr. Andres, -

HEARING EXAMINER TOCKER: Mr. Andres, you are recalled and you are still under oath.

THE WITNESS: Yes, sir.

BY MR. NOBLE:

Q. You are the same Mr. Andres that just prior to the last witness testified for the Government. A. Yes, sir.

Q. Did you ever see me before today? A. No, sir.

Q. What price do you sell Waltham watches when you resell them after acquiring them as orders from your customers? A. Well, would you like an example of it.

354 Q. Yes. A. Well, the last watch we sold last week, that was the 65 jewel, and it was an Incabloc watch, and, I believe, it retails at \$139. I mean, that is the list price on it, and we received \$80 for it including the tax.

Q. Is this substantially above the coded price? A. Yes, it is.

Q. Did you ever sell Waltham watches at the coded price to your customers? A. No.

Q. You always sell above the coded price? A. Yes.

MR. NOBLE: No further questions.

CROSS EXAMINATION

BY MR. MIDDLETON:

Q. Mr. Andres, how many Waltham watches have you sold in the past three years? A. That is the only sale that we have made. We have one in the store now and that is not sold.

Q. Can you identify that watch that you just sold? A. Yes.

Q. From Commission's Exhibit No. 128-A through -D. A. No, it is on the other sheet.

Q. I show you Commission's Exhibit No. 132-A. A. Yes, this watch right here.

355 Q. What is the identifying model number. A. The Model No. of this watch would be 336 – that the number you want.

Q. Yes, that is correct. A. Model No. 336W4650 and the retail was \$120. This one right here (indicating).

Q. And the coded price was \$46.50? A. Right.

Q. And you sold it – and the ticketed price is \$120 and you are selling it for \$80 including tax. A. \$80 including tax.

Q. And transportation charge? A. Yes, that is right.

Q. Is that the only watch you sold? A. Yes, it is.

Q. Of Waltham. A. Yes, it is.

Q. Have you ever sold any Hallmark watches? A. No.

MR. MIDDLETON: I have no further questions.

REDIRECT EXAMINATION

BY MR. NOBLE:

* * * * *

356 Q. Now, do you sell any of the products listed in your Coast-to-Coast catalog which you use in your store at the coded price? A. Do you mean at the coded wholesale price?

Q. Yes. A. No.

Q. You always sell above the coded price? A. Yes, I do.

Q. Is the coded price your cost? A. Yes, it is.

MR. NOBLE: I have no further questions.

RECROSS EXAMINATION

BY MR. MIDDLETON:

Q. Do you sell – do you ever sell at the ticketed price? A. No. When we order all like this – or, for instance, Hudson Stock, Inc. we very seldom get the full price. We don't stock them. They are ordered out of a similar deal like here and we usually do not get full price, but I always figure if you can make a few – get something for your work, that is the way it goes.

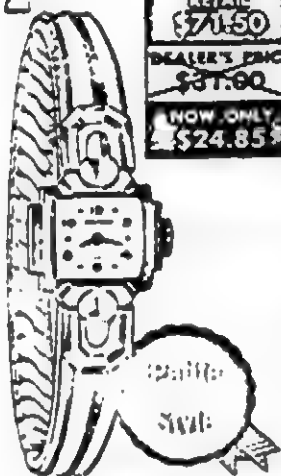
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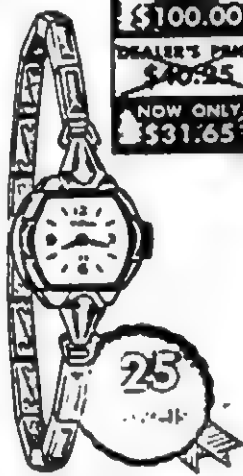
Bracelet Design
Lydia: Highly styled bracelet type watch. Sculptured case of 10K rolled gold plate, non-corrosive back. Matching gold-filled combination expansion bracelet. 17 jewel movement. Unbreakable mainspring. Incabloc protected.

337W2485 (Yellow) \$71.50
338W2485 (White) \$71.50



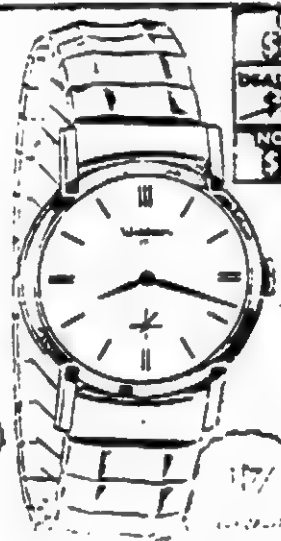
Petite Dress Watch
Cerenah: 21 Jewels. Modern chic styling. 10K rolled gold plate case, non-corrosive back. Matching gold-filled expansion bracelet. Dot-figure dial, hi-domed crystal. Unbreakable mainspring. Incabloc.

339W2795 (Yellow) \$90.00
340W2795 (White) \$90.00



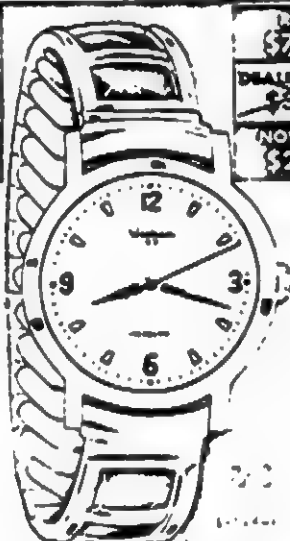
14K Gold Case
Gudy: 25 Jewels. Solid 14K gold case designed with authentic modern styling. Matching gold-filled expansion bracelet. Smart stick figure dial, hi-domed crystal. Unbreakable mainspring. Incabloc protected.

341W3165 (Yellow) \$100.
342W3165 (White) \$100.00



Wafer-thin Dress Watch
Guremond: Strikingly handsome dress watch for men. Ultra-thin styling. Yellow rolled gold plate case has non-corrosive back. Matching gold-filled expansion band. Modern stick figure dial. 17 Jewels. Unbreakable mainspring. Incabloc protection.

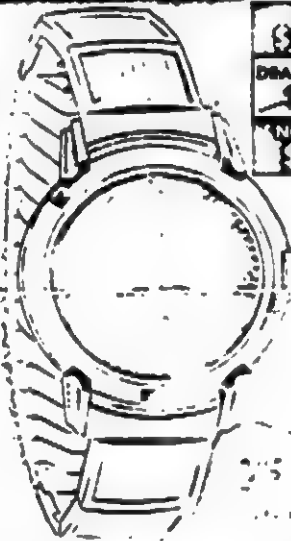
345W1940.....Retail \$49.50



Water-Resist,* Luminous
Future: Wafer-thin styling. Chrome Plated case, non-corrosive back with matching Stainless expansion band. Sweep second hand, unbreakable mainspring. Incabloc.

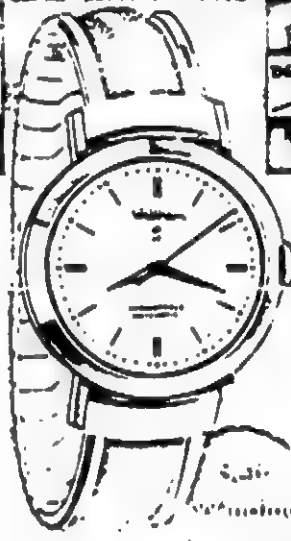
347W2490.....Retail \$79.50

As above with gold-color case.
346W2860.....Retail \$85.00



Self-winding Waterproof*
Remony: Distinctive black dial contrasts with 10K yellow rolled gold plate case. Stainless back. Matching gold-filled combination expansion bracelet. 25 Jewel automatic movement with unbreakable mainspring and Incabloc shock-protection. Sweep second hand.

348W3910.....Retail \$115.00



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Cerenah: Most handsome thin styled waterproof* watch ever made! Yellow 10K rolled gold plate case with non-corrosive back. Matching combination expansion bracelet with lizard skin insets. 17 Jewels. Unbreakable mainspring. Incabloc protected.

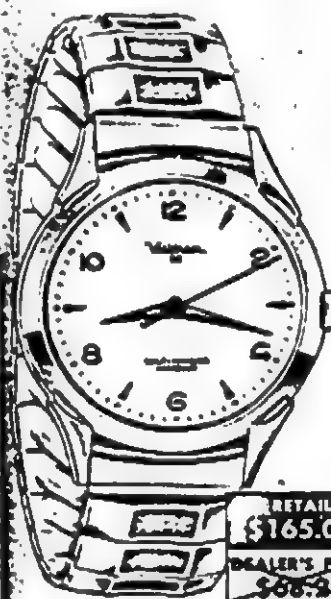
349W3030.....Retail \$110.00

53

JEWEL

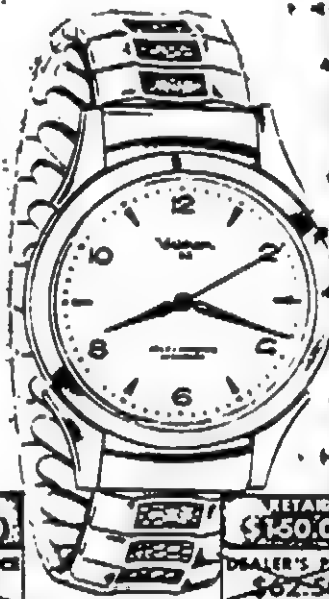
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343W5400.....Retail \$165.00



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Ship'n Shore: Rototron 53 Jewel self-winding waterproof* all-purpose watch. Case has chrome top and stainless back. Matching stainless steel expansion band with leather inset. Sweep second hand, luminous dial can be read in the dark. Unbreakable mainspring and Incabloc.

344W4925.....Retail \$150.00

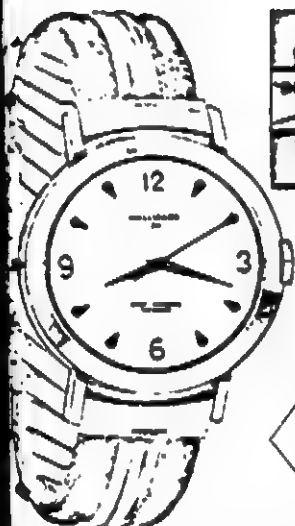
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Brigadier: Superb masterpiece of stately styling. 30 jewel self-winding movement in a waterproof* case of yellow rolled gold plate with non-corrosive back. Matching gold-filled combination expansion band with leather trim. Red sweep second hand. Unbreakable mainspring. Incabloc.

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14K Gold Case

First Lady: Case of 14K yellow gold, matching gold-filled expansion bracelet. Unbreakable mainspring. Incabloc.

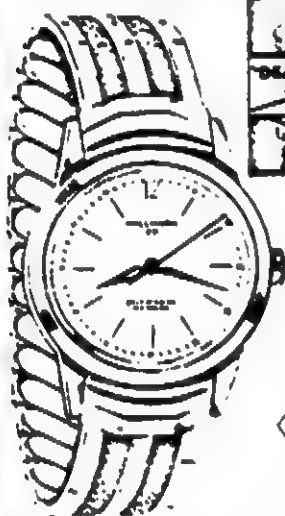
2540HK2885.....

Retail \$115.00

With 14K white gold.

2541HK2885.....

Retail \$115.00



RETAIL \$125.00
DEALER'S PRICE \$42.80
NOW ONLY \$31.70

25
jewels

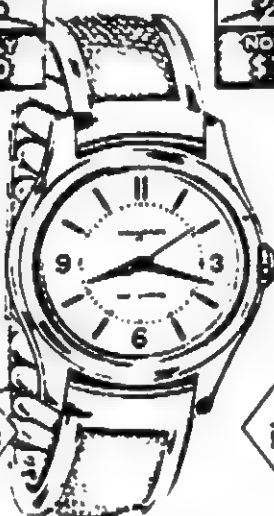
Self-winding Waterproof*

Commodore: A keepsake watch with practical features! Smart modern styling. Gleaming chrome top waterproof* case has stainless steel back. Matching stainless combination expansion bracelet, leather trim. Luminous stick figure dial can be read in the dark; red sweep second hand. Accurate 25 jewel self-winding movement has unbreakable mainspring. Incabloc shock-protection.

2545HK3170.....Retail \$125.00

RETAIL \$105.00
DEALER'S PRICE \$34.50
NOW ONLY \$25.60

Self-Winding



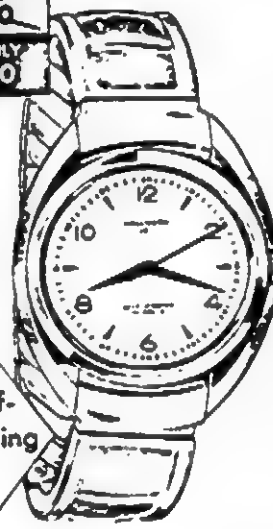
21
jewels

RETAIL \$85.00
DEALER'S PRICE \$28.75
NOW ONLY \$17.35



Self-Winding

RETAIL \$125.00
DEALER'S PRICE \$41.80
NOW ONLY \$31.50

**Self-winding Water-Resist***

Ivy League: Elegantly simple design. Chrome top case with non-corrosive back. Matching stainless combination expansion band, leather trim. Textured luminous dial can be read in dark; red sweep second hand. 17 jewel self-winding movement with unbreakable mainspring and Incabloc shock-protection.

2542HK2560.....Retail \$105.00

Water-Resistant*

Neutaire: A sportsman's watch that can be worn for any dress occasion. Case has chrome steel top, stainless back. Matching stainless steel combination expansion bracelet with leather inset. Red sweep second hand, luminous dial. 21 jewel movement, unbreakable mainspring and Incabloc shock-protection.

2543HK1735.....Retail \$85.00

Self-winding Waterproof*

Seafarer: A watch he'll wear for work, dress or sports. Has masculine style yellow gold color case, non-corrosive back. Combination gold-filled expansion band to match. Luminous dial can be read in dark; red sweep second hand. 17 jewel self-winding movement with unbreakable mainspring. Incabloc protected.

2544HK3150.....Retail \$125.00

RETAIL \$110.00
DEALER'S PRICE \$37.80
NOW ONLY \$27.80

21
jewels



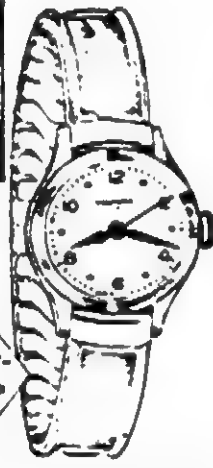
RETAIL \$75.00
DEALER'S PRICE \$25.60
NOW ONLY \$19.20

17
jewels



RETAIL \$87.50
DEALER'S PRICE \$29.05
NOW ONLY \$21.80

Water-Resist*

**2 Genuine Diamonds**

Mignen: Exquisitely engraved case set with 2 flashing diamonds. White rolled gold plate with non-corrosive back, matching gold-filled expansion bracelet. 21 Jewels. Unbreakable mainspring. Incabloc shock protected.

2546HK2780.....Retail \$110.00

As above. Yellow RGP case.

2547HK2780.....Retail \$110.00

Stunning Dress Watch

Lombardine: Classic design in yellow rolled gold color case with non-corrosive back. Gold-filled expansion bracelet to match. All arabic numeral dial. 17 jewel movement. Unbreakable mainspring and Incabloc shock-protection.

2548HK1920.....Retail \$75.00

As above. White RGP case.

2549HK1920.....Retail \$75.00

Water-Resistant*

Mary Ann: Styled for career women! Yellow gold color case with non-corrosive back. Combination expansion bracelet to match. Luminous dial, sweep second hand. 17 Jewels. Unbreakable mainspring. Incabloc shock protected.

2550HK2180.....Retail \$87.50

As above. Chrome steel case.

2551HK1965.....Retail \$80.00

FEDERAL TRADE COMMISSION
WATERPROOF
COMMISSION

703
12-3

Every watch gift boxed.

Watches illustrated are % actual size.

20% to 33 1/3% OFF!
on NEW MODELS

WALTHAM

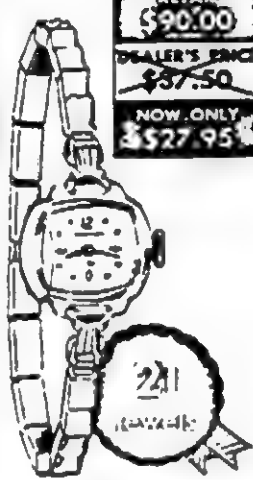
SHOCK PROTECTED BY INCABLOC

- With RESEVOIL Reserve Jewels • Gift Boxed
- Unbreakable Mainsprings • Fully Guaranteed!



Bracelet Design
Lydia: Highly styled bracelet type watch. Sculptured case of 10K rolled gold plate, non-corrosive back. Matching gold-filled combination expansion bracelet. 17 jewel movement. Unbreakable mainspring. Incabloc protected.

337W2485 (Yellow) \$71.50
338W2485 (White) \$71.50



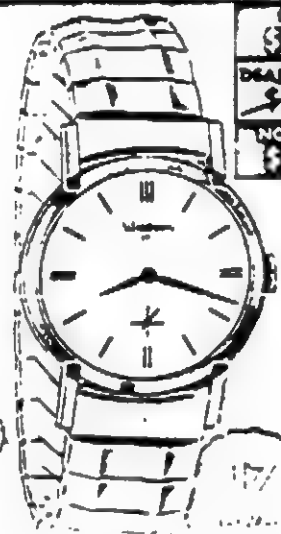
Petite Dress Watch
Coronet: 21 Jewels. Modern chic styling. 10K rolled gold plate case, non-corrosive back. Matching gold-filled expansion bracelet. Dot-figure dial, hi-domed crystal. Unbreakable mainspring. Incabloc.

339W2795 (Yellow) \$90.00
340W2795 (White) \$90.00



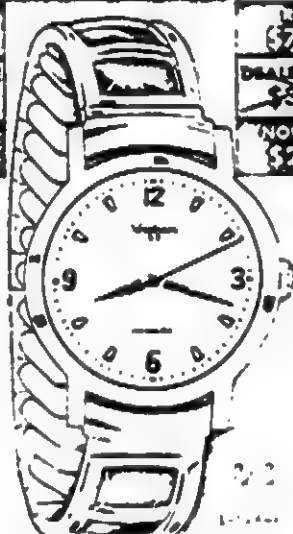
14K Gold Case
Goudys: 25 Jewels. Solid 14K gold case designed with authentic modern styling. Matching gold-filled expansion bracelet. Smart stick figure dial, hi-domed crystal. Unbreakable mainspring. Incabloc protected.

341W3165 (Yellow) \$100.
342W3165 (White) \$100.00



Wafer-thin Dress Watch
Guaranda: Strikingly handsome dress watch for men. Ultra-thin styling. Yellow rolled gold plate case has non-corrosive back. Matching gold-filled expansion band. Modern stick figure dial. 17 Jewels. Unbreakable mainspring. Incabloc protection.

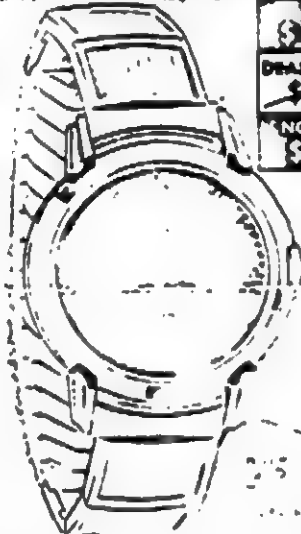
345W1940.....Retail \$69.50



Water-Resist,* Luminous
Futura: Wafer-thin styling. Chrome Plated case, non-corrosive back with matching Stainless expansion band. Sweep second hand, unbreakable mainspring. Incabloc.

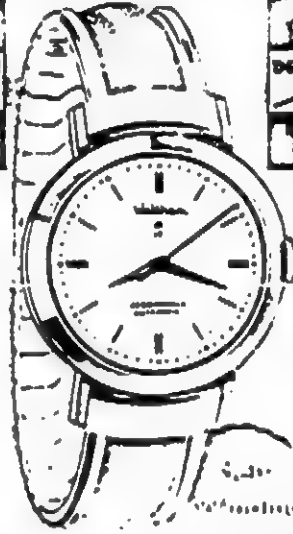
347W2490.....Retail \$79.50

As above with gold-color case.
346W2840.....Retail \$85.00



Self-winding Waterproof*
Remany: Distinctive black dial contrasts with 10K yellow rolled gold plate case. Stainless back. Matching gold-filled combination expansion bracelet. 25 Jewel automatic movement with unbreakable mainspring and Incabloc shock-protection. Sweep second hand.

348W3910.....Retail \$115.00



Self-winding Waterproof*
Coronet: Most handsome thin styled waterproof* watch ever made! Yellow 10K rolled gold plate case with non-corrosive back. Matching combination expansion bracelet with lizard skin insets. 17 Jewels. Unbreakable mainspring. Incabloc protected.

349W3030.....Retail \$110.00

53

JEWEL

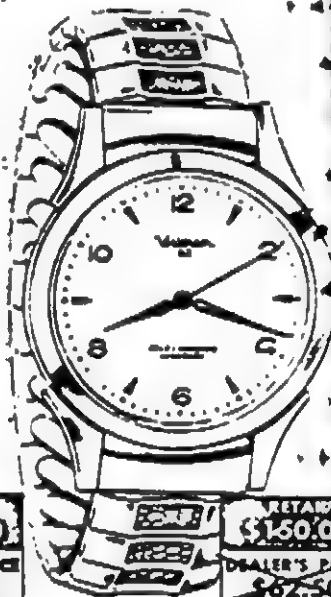
Rototron®

SELF-WINDING



Waterproof*
Rototron 53 Jewel self-winding waterproof* watch, most efficient watch ever made! 10K yellow rolled gold plate case with stainless steel back. Matching gold filled expansion band with leather inserts. Sweep second hand, luminous dial. Unbreakable mainspring. With Incabloc.

343W5400.....Retail \$165.00



Waterproof*
Ship'n Shore: Rototron 53 Jewel self-winding waterproof* all-purpose watch. Case has chrome top and stainless back. Matching stainless steel expansion band with leather insets. Sweep second hand, luminous dial can be read in the dark. Unbreakable mainspring and Incabloc.

344W4925.....Retail \$150.00

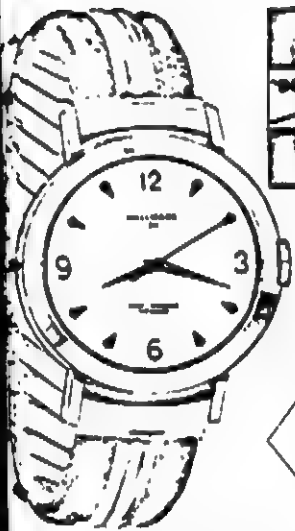
Retail Prices include Federal Excise Tax; Dealer's Prices do not.
*GUARANTEED WATERPROOF as long as case, crown and crystal are intact.

SX IDA 702

LIFETIME GUARANTEE • WITH RESERVE VOLUME JEWELS

Hallmark

17, 21, 25, and 30 jewels available

Save 25% to 40%

RETAIL \$195.00
DEALER'S PRICE \$63.85
NOW ONLY \$47.75

30
jewels

- Self-winding Waterproof*
- Luminous hands and dial

Brigadier: Superb masterpiece of stately styling. 30 jewel self-winding movement in a waterproof* case of yellow rolled gold plate with non-corrosive back. Matching gold-filled combination expansion band with leather trim. Red sweep second hand. Unbreakable mainspring. Incabloc. 2539HK4775. Retail \$175.00

RETAIL \$115.00
DEALER'S PRICE \$38.45
NOW ONLY \$28.85

25
jewels

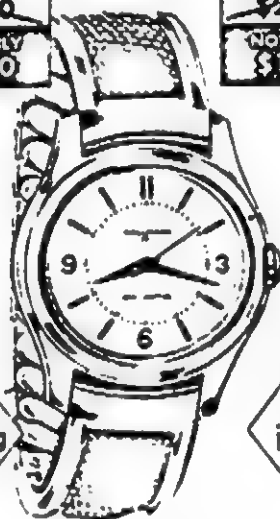
14K Gold Case

First Lady: Case of 14K yellow gold, matching gold-filled expansion bracelet. Unbreakable mainspring. Incabloc. 2540HK2885.

Retail \$115.00
With 14K white gold. 2541HK2885.
Retail \$115.00

RETAIL \$105.00
DEALER'S PRICE \$34.10
NOW ONLY \$25.60

Self-Winding



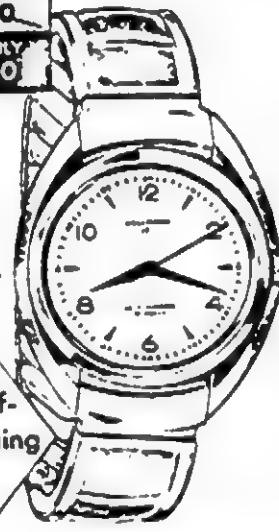
21
jewels

RETAIL \$85.00
DEALER'S PRICE \$28.75
NOW ONLY \$17.35



RETAIL \$125.00
DEALER'S PRICE \$41.80
NOW ONLY \$31.50

Self-Winding

**Self-winding Water-Resist***

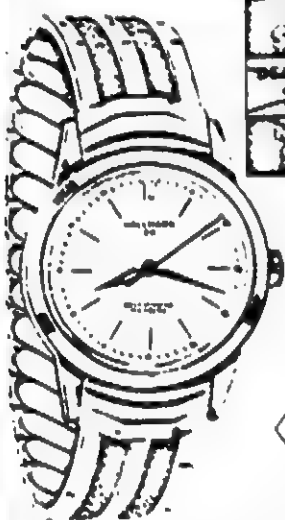
Ivy League: Elegantly simple design. Chrome top case with non-corrosive back. Matching stainless combination expansion band, leather trim. Textured luminous dial can be read in dark; red sweep second hand. 17 jewel self-winding movement with unbreakable mainspring and Incabloc shock-protection. 2542HK2560. Retail \$105.00

Water-Resistant*

Neutaire: A sportsman's watch that can be worn for any dress occasion. Case has chrome steel top, stainless back. Matching stainless steel combination expansion bracelet with leather inset. Red sweep second hand, luminous dial. 21 jewel movement, unbreakable mainspring and Incabloc shock-protection. 2543HK1735. Retail \$85.00

Self-winding Waterproof*

Seafarer: A watch he'll wear for work, dress or sports. Has masculine style yellow gold color case, non-corrosive back. Combination gold-filled expansion band to match. Luminous dial can be read in dark; red sweep second hand. 17 jewel self-winding movement with unbreakable mainspring. Incabloc protected. 2544HK3150. Retail \$125.00



RETAIL \$125.00
DEALER'S PRICE \$42.80
NOW ONLY \$31.70

25
jewels

Self-winding Waterproof*

Commodore: A keepsake watch with practical features! Smart modern styling. Gleaming chrome top waterproof* case has stainless steel back. Matching stainless combination expansion bracelet, leather trim. Luminous stick figure dial can be read in the dark; red sweep second hand. Accurate 25 jewel self-winding movement has unbreakable mainspring. Incabloc shock-protection. 2545HK3170. Retail \$125.00

RETAIL \$110.00
DEALER'S PRICE \$37.80
NOW ONLY \$27.80

21
jewels

**2 Genuine Diamonds**

Mignon: Exquisitely engraved case set with 2 flashing diamonds. White rolled gold plate with non-corrosive back, matching gold-filled expansion bracelet. 21 Jewels. Unbreakable mainspring. Incabloc shock protected. 2546HK2780. Retail \$110.00
As above. Yellow RGP case. 2547HK2780. Retail \$110.00

RETAIL \$75.00
DEALER'S PRICE \$25.60
NOW ONLY \$19.20

17
jewels

**Stunning Dress Watch**

Lombardine: Classic design in yellow rolled gold plate case with non-corrosive back. Gold-filled expansion bracelet to match. All arabic numeral dial. 17 jewel movement. Unbreakable mainspring and Incabloc shock-protection. 2548HK1920. Retail \$75.00
As above. White RGP case. 2549HK1920. Retail \$75.00

RETAIL \$87.50
DEALER'S PRICE \$29.05
NOW ONLY \$21.80

Water-Resist*

**Water-Resistant***

Mary Ann: styled for career women! Yellow gold color case with non-corrosive back. Combination expansion bracelet to match. Luminous dial, sweep second hand. 17 Jewels. Unbreakable mainspring. Incabloc shock protected. 2550HK2180. Retail \$87.50
As above. Chrome steel case. 2551HK1965. Retail \$80.00

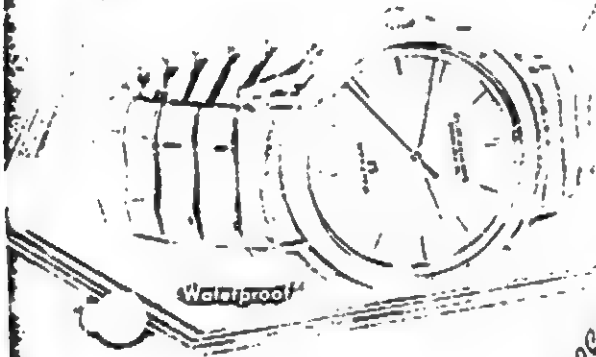
FEDERAL TRADE COMMISSION
GUARANTEED WATERPROOF* as long as crown and crystal are intact. Watches illustrated are 1/2 actual size.
BUCKET NO. 703

Every watch gift boxed.

WALTHAM

Shock-Protected by INCABLOC

Fully Guaranteed



ROTORON: 53 functional jewels! Most efficient self-winding watch made. Yellow gold filled case with non-corrosive back. Matching expansion bracelet. Incabloc shock-protection. Unbreakable mainspring. 4385W6825 Retail \$175.00

As above. Chrome top case, stainless back. 4386W5895 Retail \$135.00

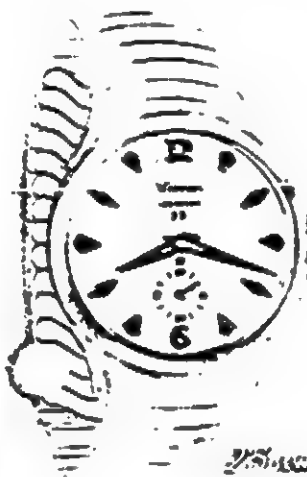
Transportation and Railroad Style Watch

For drivers, railroad men, mechanics, sportsman, others. Easy to read dial. 10K yellow rolled gold plate case with gold-filled chain. Accurate 17 Jewel movement has unbreakable mainspring. Incabloc. 4369W3225. Ret. \$75.00

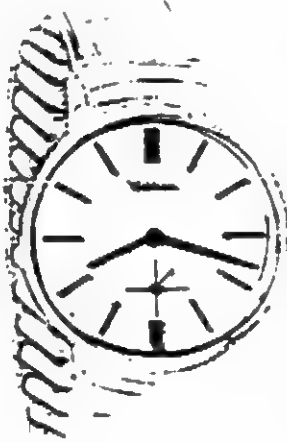
Each watch gift boxed.

*Includes RESEVOIR oil reserve jewels.

FEATURE VALUE



25 JEWELS
10K GOLD CASE



Springfield: 25* Jewels. Solid 14K yellow gold case with matching gold-filled expansion bracelet. Superb executive styling with ultra-modern dial. Shock-protected with Incabloc, has unbreakable mainspring for trouble-free service. 4374W5480 Retail \$135.00

Retail Prices include Federal Excise Tax.

**GUARANTEED WATERPROOF as long as case, crown and crystal remain intact.

Columet: A presentation styled dress watch to be cherished thru the years. 10K yellow rolled gold plate case, non-corrosive back, matching gold-filled combination expansion bracelet. 17 Jewels with unbreakable mainspring. Incabloc. 4377W2815 Retail \$65.00



Whiting: Ultra-thin waterproof** watch with chrome top, stainless steel back case. Gold-filled combination expansion bracelet. 17 Jewels. Incabloc protected, unbreakable mainspring. 4370W3120 Retail \$71.50

4371W2725 As above, with chrome top, stainless back case. Retail \$59.50

Gary: 23* Jewel water resistant**. Chrome top, stainless steel back case, matching combination expansion band. Unbreakable mainspring, Incabloc protection. 4372W2940 Retail \$75.00

As above, yellow gold colored case, matching gold filled expansion bracelet. 4373W3170 Retail \$85.00

Devonport: 21* Jewels. 10K yellow rolled gold plate case, non-corrosive back. Matching gold-filled expansion bracelet. Unbreakable mainspring, Incabloc shock protection. 4374W3045 Retail \$75.00

4375W3045 As above, with white dial. Retail \$75.00



Backford: Self-winding waterproof** watch with chrome top, stainless steel back case. Stainless combination bracelet. 17 Jewels. Unbreakable mainspring. Incabloc. 4380W3820 Retail \$85.00

4381W4085 As above. Yellow gold color case, gold-filled bracelet. Retail \$95.00

Griffin: 25* Jewel self-winding waterproof** watch. 10K yellow gold-filled case, non-corrosive back. Gold-filled combination expansion band. Unbreakable mainspring. Incabloc. 4382W4825 Retail \$120.00

As above. Chrome top, non-corrosive back case. Stainless steel expansion band. 4383W3940 Retail \$92.50

Munster: 30 Jewel self-winding waterproof** watch. 10K yellow rolled gold plate case, stainless back. Gold-filled combination expansion band. Non-break mainspring. Incabloc. 4388W5895 Retail \$135.00

CX-18

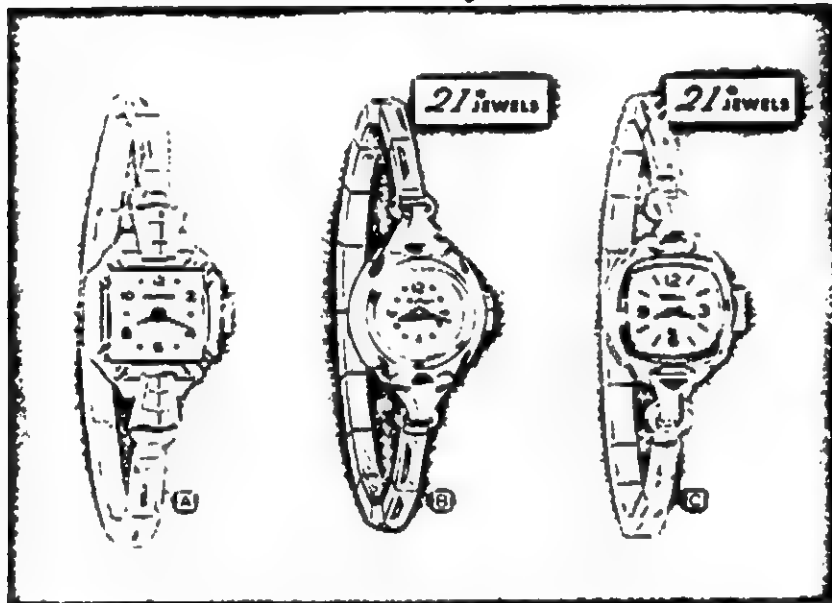
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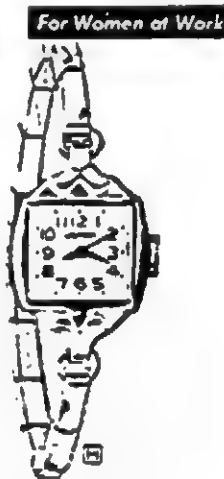
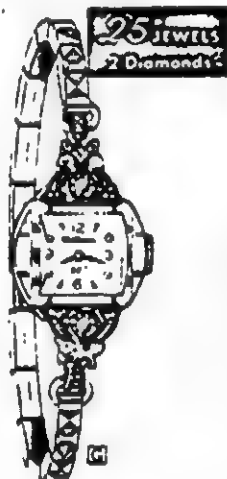
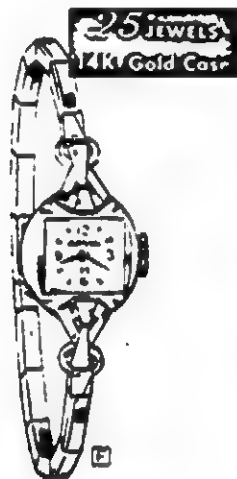
from the on

WALTHAM

Shock-Protected by INCABLOC



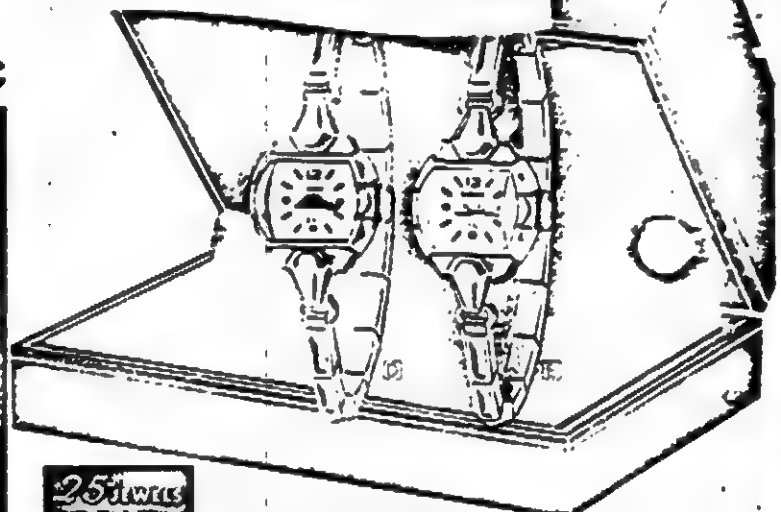
- A** Celler: 10K yellow rolled gold plate case and non-corrosive back, matching gold-filled expansion bracelet. 17 Jewels. Incabloc. Unbreakable mainspring. Retail \$45.00
4343W2685
4344W2685 As above, with 10K white rolled gold plate case. Retail \$45.00
- B** Camille: 21* Jewels. 10K white rolled gold plate case, stainless steel back. Gold-filled expansion bracelet. Unbreakable mainspring. Incabloc. Retail \$72.50
4346W2875
4345W2875 As above. Yellow rolled gold plate case. Retail \$72.50
- C** Camille: 21* Jewels. 10K yellow rolled gold plate case, stainless back. Matching gold-filled expansion bracelet. Unbreakable mainspring. Incabloc. Retail \$79.50
4347W2945
4348W2945 As above, with 10K white rolled gold plate case. Retail \$79.50



- E** Geneva: 25* Jewels. Sculptured base is solid 14K white gold. Gold-filled expansion bracelet. Unbreakable mainspring. Incabloc. Retail \$135.00
4354W4495
As above, with case of solid 14K yellow gold. Matching expansion bracelet. Retail \$135.00
4353W4495
- F** Venetia: 25* Jewels. Two blazing diamonds set in case of 10K white rolled gold plate. Non-corrosive back. Matching expansion bracelet. The accurate movement has unbreakable mainspring, Incabloc shock protection. Retail \$100.00
4356W3585
As above. 2 diamonds. Yellow rolled gold plate case. Retail \$100.00
4355W3585
- G** Florence: NURSES' WATCH. Case is 10K yellow rolled gold plate with non-corrosive back, matching gold-filled expansion bracelet. Legible dial has red sweep second hand. Unbreakable mainspring. With Incabloc. Retail \$71.50
4361W3015
As above, with white rolled gold plate case, gold-filled expansion band. Retail \$71.50
4362W3015

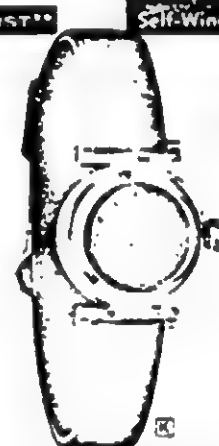
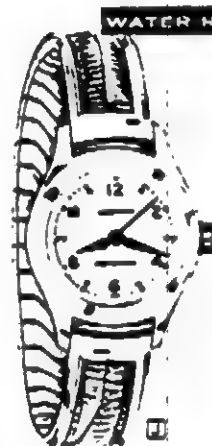
**GUARANTEED WATERPROOF as long as case, crown and crystal remain intact.

Fully Guaranteed



25 JEWELS
14 K Gold Case

- D** Arcadia: 25* Jewels. Solid 14K yellow gold dress watch with authentic modern styling. Matching gold-filled expansion bracelet. Legible stick-figure dial. Unbreakable mainspring. Shock-protected with famous Incabloc. Retail \$85.00
4349W3750
- E** Ardelle: As above. With 14K white gold case. Retail \$85.00
4350W3750



- H** Lemire: Lady's sports watch. Water-resist** case has chrome top, stainless steel back. Matching combination expansion bracelet with simulated leather insets. 17 Jewels. Movement has unbreakable mainspring, Incabloc protection. Retail \$42.50
4359W2625
As above, yellow gold colored case. Gold-filled expansion band. Retail \$49.50
4360W2890
- I** Prodenia: Lady's self-winding sports watch. Waterproof** case is all 10K yellow gold filled case. Black suede strap. 17 Jewel movement, unbreakable mainspring, Incabloc. Retail \$120.00
4363W4750
As above, with white dial. Retail \$120.00
4364W4750

Watches illustrated are 3/4 actual size.

Retail Prices include Federal Excise Tax.

- J** Granden: Lady's highly styled bracelet type watch. Sculptured case is of 10K yellow rolled gold plate. Matching gold filled bracelet expands to fit the wrist. Dependable 17 Jewel movement has unbreakable mainspring, shock-protected with Incabloc. Retail \$65.00
4365W2910
- As above. White rolled gold plate case. Retail \$65.00
4366W2910

*Includes RESERVOIR oil reserve jewels.

ADVERTISED
LIFE

WALTHAM

Unconditional
Lifetime Guarantee

on all movement parts against breakage

Each Watch Gift Boxed

INCABLOC Shock Protected

More Accurate More Efficient

65

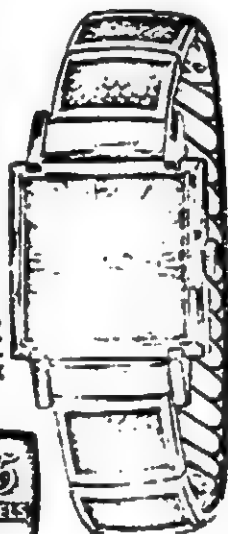
Functional JEWELS

**Waterproof*
Self-Winding**

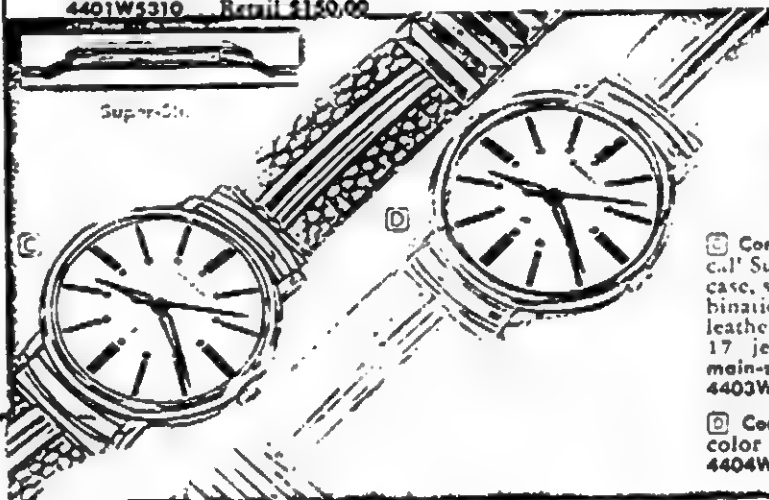


A Presentation Rototron 65:
New, different. Finest self-
winding movement made.
Built-in shock-absorbers give
utmost precision, greatest
durability. Waterproof* gold-
filled case with stainless back.
Has matching expansion
bracelet. Luminous dial,
sweep second hand, unbreak-
able mainspring. Shock-pro-
tected movement.
4400W5995...Retail \$175.00

B Ship'n Shore Rototron 65:
as above. All steel case, band.
4401W5310...Retail \$150.00



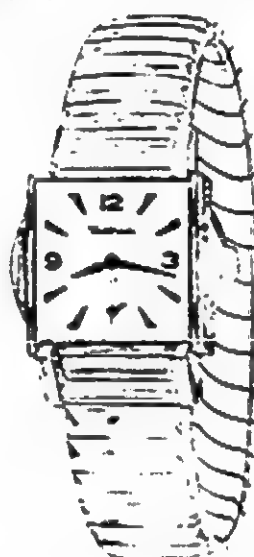
Jean LaFitter: 25 Jewels: Dashing
dress watch with black dial. Yellow
rolled gold plate case, non-
corrosive back. Gold-filled ex-
pansion band with leather insets.
Unbreakable mainspring, shock-pro-
tected Waltham movement.
4402W2830...Retail \$79.50



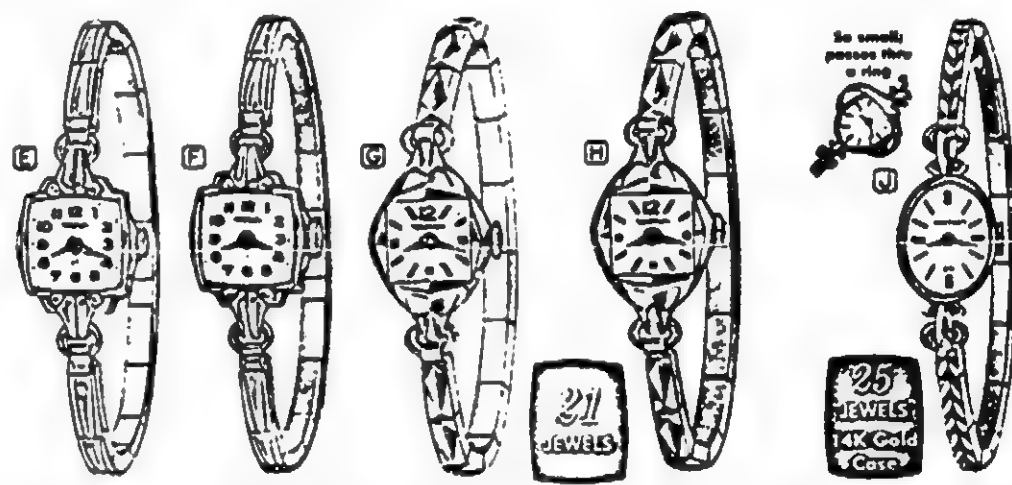
Waterproof*

C Corvette "A": Dressy and practical!
Super-slim waterproof* chrome
case, stainless steel back. Steel com-
bination expansion bracelet, black
leather trim. Red sweep second hand.
17 jewel movement. Unbreakable
main-spring, shock-protected.
4403W2495...Retail \$65.00

D Corvette "B": As above. Yellow
color case, gold-filled bracelet.
4404W2885...Retail \$75.00



Moultrie: Dignified presentation watch.
10K yellow rolled gold plate case
with non-corrosive back. Matching
gold-filled expansion bracelet. 17
jewels. Unbreakable mainspring, shock-
protected with Incabloc.
4403W2395...Retail \$65.00



E Adams: Easy to read dress
watch. White rolled gold plate
case, steel back. Gold-filled ex-
pansion bracelet. 17 Jewels.
Non-break mainspring. Incabloc.
4406W2395...Retail \$65.00

F Washington: As above. Yellow
RGP case, G.P. bracelet.
4407W2395...Retail \$65.00

G Amy: 21 Jewels. Carved case
of white rolled gold plate. Steel
back. Matching gold-filled ex-
pansion bracelet. Unbreakable
mainspring. Incabloc protected.
4408W2675...Retail \$72.50

H Katherine: As above. Yellow
RGP case. Gold-filled bracelet.
4409W2675...Retail \$72.50

I Merigold: 25 Jewels; 14K yellow
gold case so dainty it will
fit through a ring. Matching
gold-filled expansion bracelet.
Easy to read dial. Very elegant
styling. Movement shock pro-
tected with Incabloc, has un-
breakable mainspring.
4410W4185...Retail \$115.00

Retail prices include Federal Excise Tax;
dealer's cost do not.

*GUARANTEED WATERPROOF as long as case, crown and crystal remain intact.

CX - 19 A

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BEST CO

from the ori

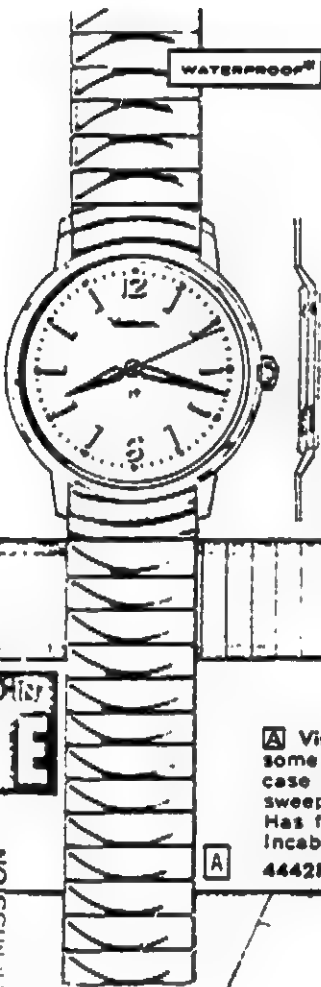
Waltham Premier

unconditional Lifetime Guarantee
on movement parts against breakage

Watches of prize-winning quality... finer cases and bracelets... more accurate, dependable movements... performance you can be proud of... styled with a handsome, modern flair. Waltham Premier, a famous name, part of the American scene since 1850!

Ultra-Thin

Retail Prices Include Federal Excise Tax; dealer's prices do not.



A Viscount: Waterproof® thin-as-a-coin watch, handsome in its neat, masculine styling. All stainless steel case and matching steel expansion bracelet. Red sweep second hand. Luminous hands and hour dots. Has fine 17 jewel movement shock-protected with Incabloc and with unbreakable mainspring.

4442P3060

Retail \$95.00

B Diplomat: 21 jewels. Truly an elegant watch for the man of sophistication. Thin-as-a-coin case is all 10K yellow gold-filled and has a matching expansion bracelet. Smart champagne colored dial has modern contrasting hour markers. Movement shock-protected by Incabloc, has unbreakable mainspring.

4443P4065

Retail \$125.00

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LIFE

THUR 5:30 PM APR 28 1960
DANIEL D. WOOD
ATTORNEY FEDERAL TRADE COMMISSION



25 JEWELS

25 JEWELS

C

Ultra-Thin

D

C Continental: 25 Jewels. Debonair, dashing, thin-as-a-coin and a wonderful time-keeper. 10K yellow gold-filled case and back. Genuine black alligator band. Black dial, gilt stick figures. Shock-protected with Incabloc. Unbreakable mainspring.

4444P4010

Retail \$125.00

D Imperial: 25 Jewels. Solid 14K yellow gold case. Thin-as-a-coin styling in an attractive new design. Genuine brown alligator band completes the effect of luxurious simplicity. Movement is shock protected with Incabloc. Unbreakable mainspring.

4445P5725

Retail \$175.00

E Hanover: Self-winding waterproof® watch in a modern suave design. Case is yellow gold color with stainless steel back. Matching gold-filled combination expansion bracelet with genuine alligator trim. Champagne color dial, luminous hands and hour dots. Red sweep second hand. 17 jewel movement shock-protected by Incabloc, has unbreakable mainspring.

4446P4090

Retail \$125.00

F Sea Clipper Self-winding waterproof® watch suitable for military or naval use! All-stainless steel case and expansion bracelet. Luminous hands and hour dots can be read in the dark. Red sweep second hand. Modern skip-figure dial. 17 jewel movement is shock protected with Incabloc. Unbreakable mainspring.

4447P4620

Retail \$135.00

G Pace-Setter: 25 Jewels. Waterproof® dress watch reaches a new height in modern styling. Streamlined wrap-around crystal, textured black dial. Hour marks on dial and bezel. Yellow gold-filled case, stainless steel back. Matching combination expansion bracelet with leather trim. Incabloc. Non-break mainspring.

4448P5055

Retail \$150.00

*Guaranteed waterproof as long as case, crown and crystal are intact.



65 Jewel self-winding

H Rototron VII: 65 Jewel self-winding waterproof® watch. New type of automatic movement is more efficient, more accurate than any other kind! Has built-in shock absorbers, transforms every motion of wrist into time-keeping energy. All stainless steel case and matching combination expansion bracelet with leather trim. Sweep second hand. Incabloc protected. Has unbreakable mainspring.

4449P5830

Retail \$175.00

I Rototron V: 65 Jewel self-winding waterproof® dress watch. Solid 14K yellow gold case. Gold-filled combination expansion bracelet.

4450P9260

Retail \$275.00

As above. Waterproof® 10K yellow gold filled case, combination expansion bracelet.

4451P6320

Retail \$195.00

72:

CX-22

Waltham

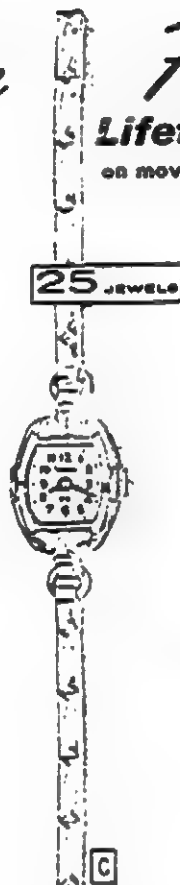
Premier
Lifetime Guarantee
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A Gigi: 21 Jewels. A dress watch enchantingly modelled. 10K white rolled gold plate case, stainless steel back. Matching gold-filled expansion bracelet. Incabloc, non-break mainspring.

4452P2890
Retail \$87.50

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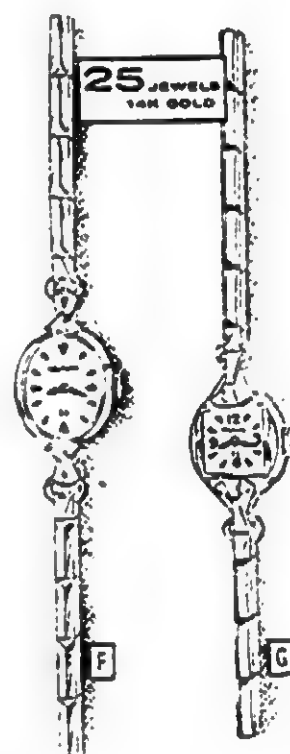
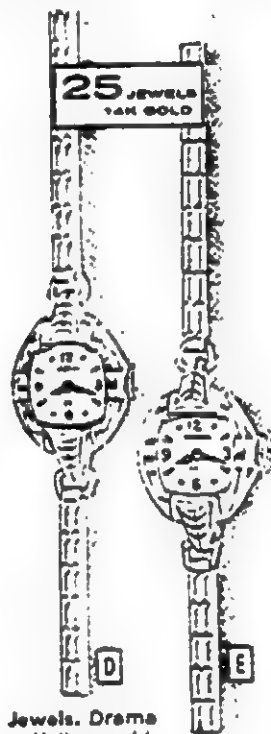
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G Jubilee Y: 25 Jewels. Solid 14K yellow gold case, petite but sturdy. Gold-filled expansion bracelet. Incabloc shock-protected. Non-break mainspring.

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H Baltimore: 25 Jewels. 2 genuine radiant diamonds in a sculptured case of white rolled gold plate. Stainless steel back. Gold-filled expansion bracelet. Incabloc shock-protected. Unbreakable mainspring.

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I Windsor: 25 Jewels. 4 blazing diamonds in a very elegant case of solid 14K white gold. Matching gold-filled expansion bracelet. Modern skip-figure dial. Incabloc protected. Unbreakable mainspring.

4462P5585 Retail \$165.00

K Buckingham: 25 Jewels. 8 fiery diamonds in a richly carved case of solid 14K white gold. Black silk cord bracelet has a gold-filled safety chain attached. Incabloc protected. Unbreakable mainspring.

4463P6925 Retail \$210.00

L Crown: 25 Jewels. 22 blazing diamonds in a luxurious case of solid 14K white gold. The peak of gracious beauty. Black silk cord bracelet with gold-filled safety chain. Incabloc. Unbreakable mainspring.

4464P10850 Retail \$325.00

723

*Guaranteed waterproof as long as case, crown and crystal are intact.
Retail Prices include Federal Excise Tax; dealer's prices do not.

25 Jewel Diamond Watches



M Giselle: Self-winding waterproof* watch for ladies. Ideal for nurses, career women, sportswomen, homemakers. Chrome top case has steel back, matching stainless steel expansion bracelet. Luminous hands and hour dots, red sweep second hand. Dependable 17 jewel movement is shock protected with Incabloc, has unbreakable mainspring, many other quality features.

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4460P4600 Retail \$140.00

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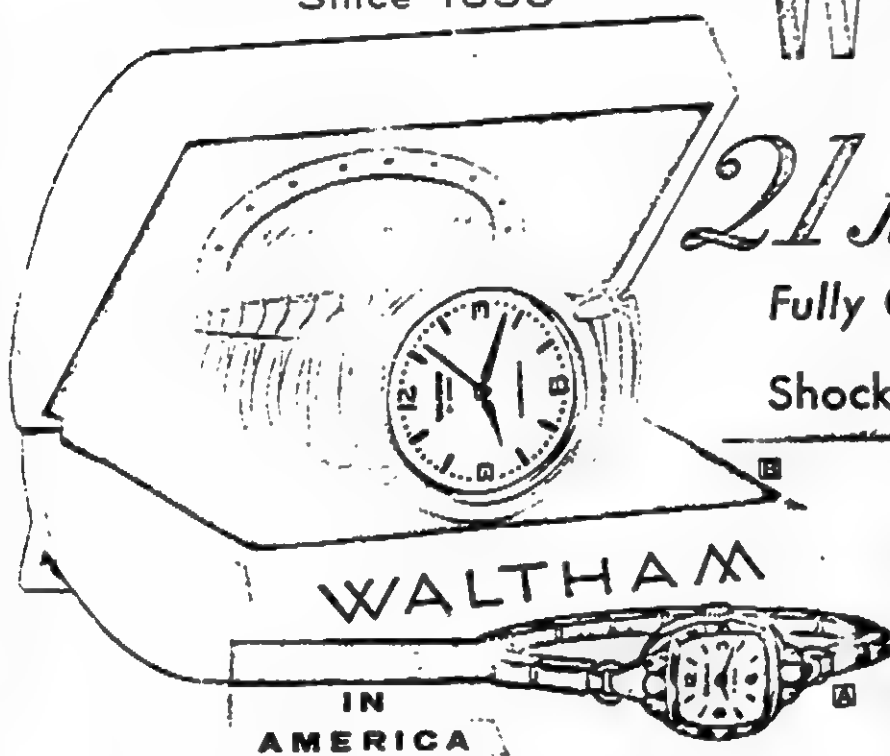
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America's First Watchmaker
Since 1850

103

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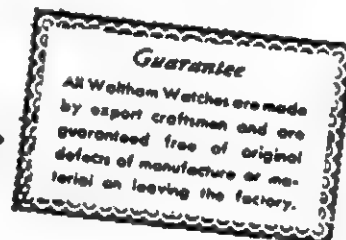
WALTHAM



21 Jewel Watches

Fully Guaranteed

Shock-Protected by INCABLOC*



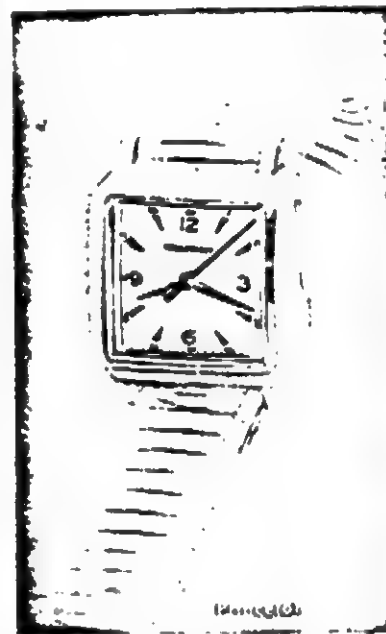
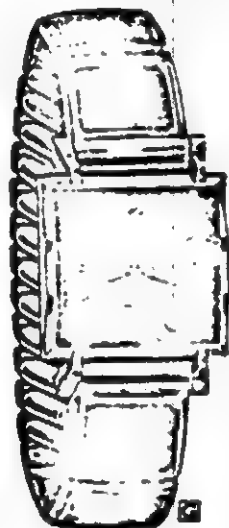
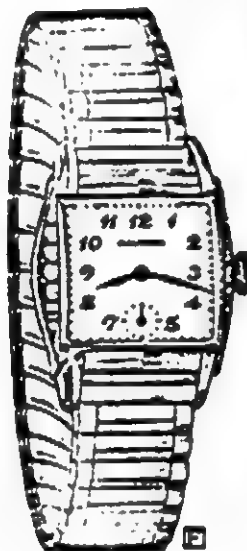
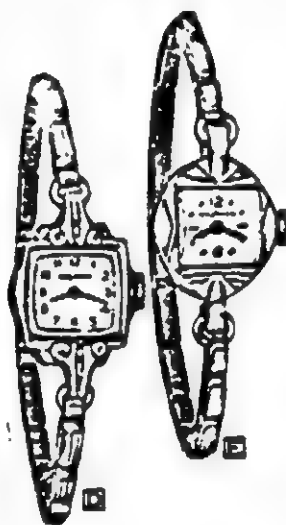
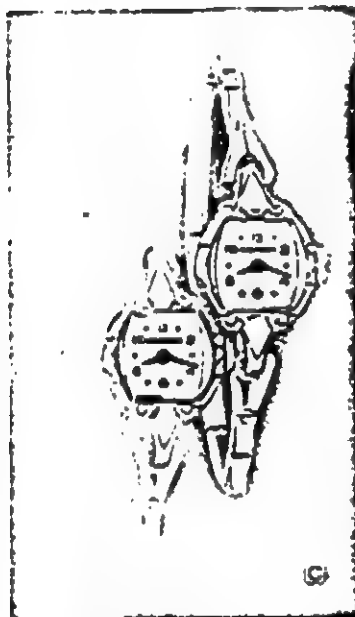
American Premier Series

Bunker Hill . . . 21 Jewels . . . Waterproof* watch as dependable as the Minute Man! Dust-protected yellow rolled gold plate case, matching expansion band. Easy-to-read dial. Shock-protected with famous Incabloc.

101W3795 Retail \$85.00

Betsy Ross . . . 21 Jewels . . . Charmingly styled with a delightful end-piece motif. Dust-protected case is of yellow rolled gold plate. Matching expansion bracelet. High domed crystal, legible dial. Shock-protected.

100W3395 Retail \$75.00



Barbara Fitchie . . . Stunning watch of solid 14K yellow gold. Matching expansion bracelet. 17 Jewels. Shock-protected.

104W3095 Retail \$71.50

As above, in 14K white gold.

105W3095 Retail \$71.50

Maria Washington . . . Gracious as our first First Lady! Skillfully carved dust-protected case of yellow rolled gold plate with matching expansion bracelet. Domed crystal. 17 Jewel shock-protected movement.

102W2495 Retail \$55.00

Priscilla Alden . . . Dainty as can be! Cushion shaped case of yellow rolled gold plate with matching expansion bracelet. Non-corrosive back, very legible modern dial. 17 Jewel shock-protected movement.

FEDERAL TRADE COMMISSION

Cumberland . . . Elegant in a most masculine manner. 17 Jewel shock-protected movement in a handsome dust-protected case of yellow rolled gold plate. Matching expansion band. Easy-to-read dial, domed crystal.

106W2345 Retail \$52.50

Joan LaFino . . . Handsome black dial, expansion band set with leather squares. 17 Jewels. Shock-resistant. Rolled gold plate.

107W2650 Retail \$42.50

As above, with white dial.

108W2650 Retail \$42.50

Princeton . . . Genuine "Ivy League" styling for the most discriminating man! 17 Jewel shock-resistant movement. Dust-protected case of yellow rolled gold plate. Non-corrosive back. Matching expansion band.

109W2570 Retail \$59.50

INCABLOC prevents breakage of the balance staff of the watch. Tiny resilient springs absorb the jars and jolts the movement undergoes, thereby eliminating a major source of costly repair work.

1457

POCKET NO. 8396 - COMMISSION EXHIBIT NO. 96-J - Each watch gift boxed.

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Original bound volume

Waltham

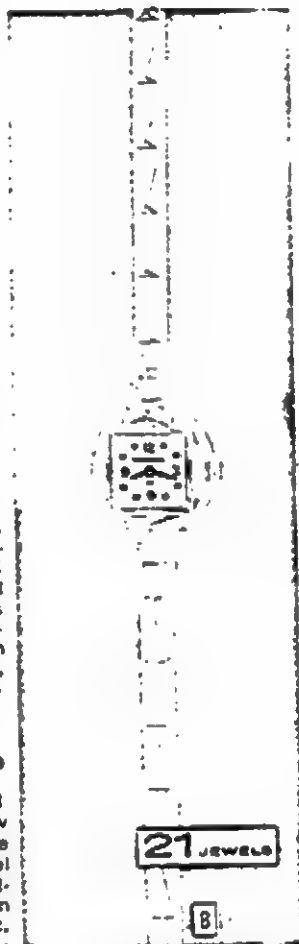
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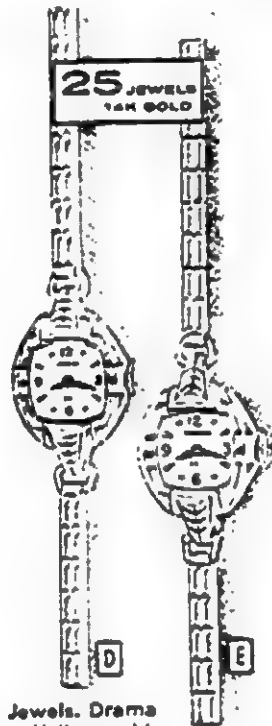
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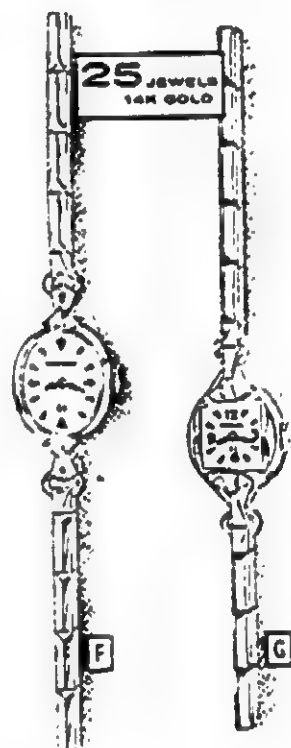


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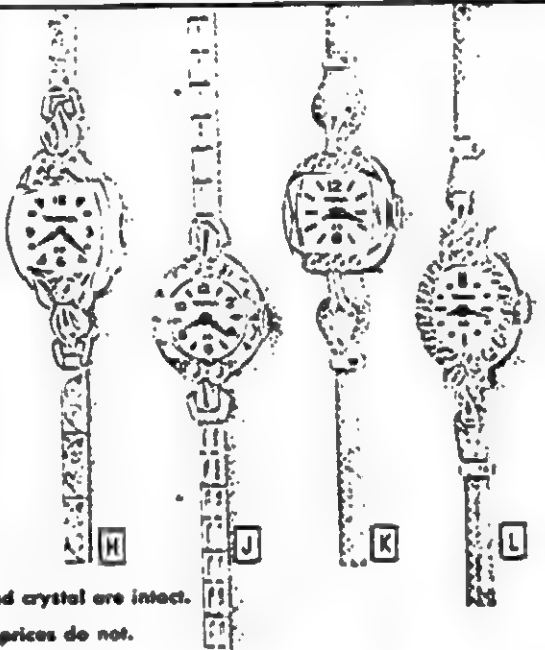
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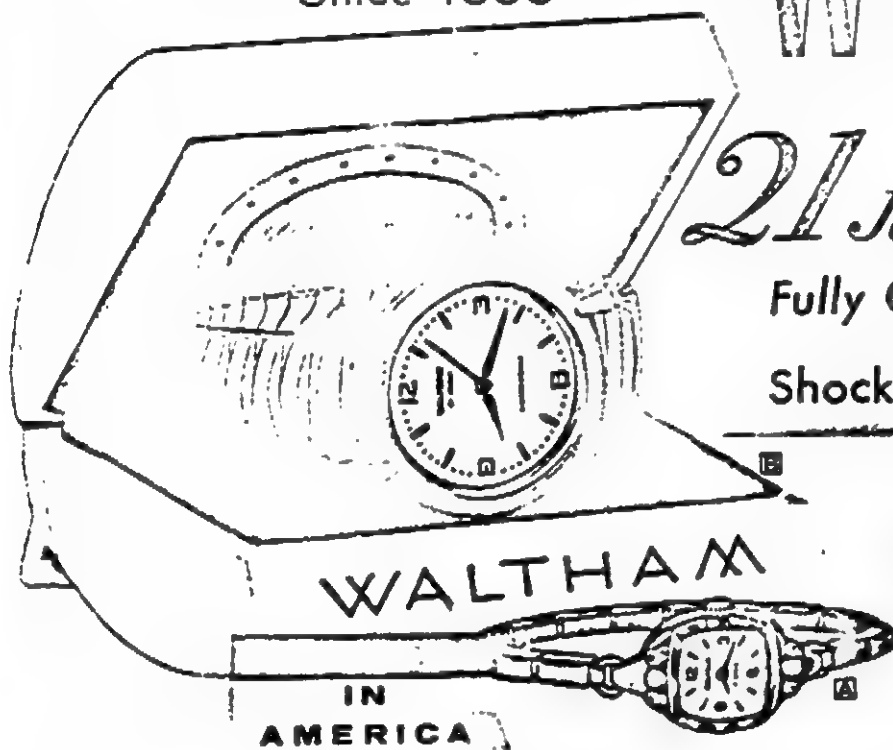
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America's First Watchmaker
Since 1850

103

Commission Exhibit No. 96-J

WALTHAM



21 Jewel Watches

Fully Guaranteed

Shock-Protected by INCABLOC*

Guarantee
All Waltham Watches are made by expert craftsmen and are guaranteed free of original defects of manufacture or material on leaving the factory.

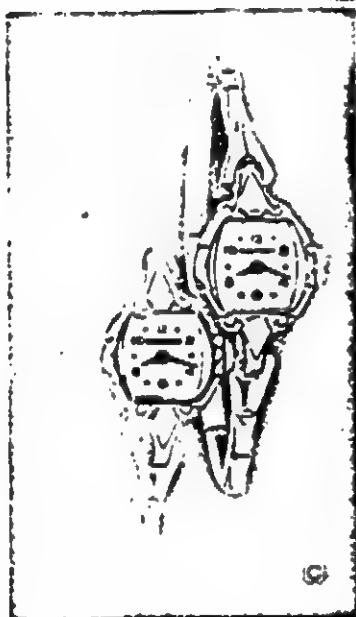
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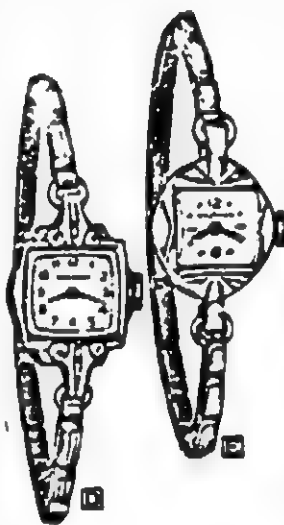
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1457

FEDERAL TRADE COMMISSION

MOCKET NO. 8396 COMMISSION EXHIBIT NO. 96-J

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ISSUED
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Save 20% to 30%

RETAIL
\$59.50NOW ONLY
\$18.90

Executive styled 17 Jewel watch, color of natural gold. Stainless back, gold-filled expansion band. Dust-protected case. Movement shock-protected with Incabloc. Handsome gift box. 2380HK1890... Retail \$59.50

21* Jewels

RETAIL
\$79.50NOW ONLY
\$24.25

21 Jewel watch with ultra-smart design. Yellow rolled gold plate case, stainless back. Combination expansion band, with black alligator insets. Movement is shock protected with Incabloc. 2381HK2425... Retail \$79.50

25* Jewels

RETAIL
\$90.00NOW ONLY
\$28.35

25 Jewel movement! Modern case is natural gold color. Non-corrosive back. Gold-filled combination expansion band with brown alligator leather insets. Shock protected with Incabloc. 2382HK2835... Retail \$90.00

LIFETIME GUARANTEE

against any defective or broken part. No charge for material or labor as specified in Hallmark's guarantee certificate.

RETAIL
\$57.50NOW ONLY
\$15.95RETAIL
\$75.00NOW ONLY
\$25.65

- THIS IS IT... If you want a watch for rugged service... the same type recommended for military use! WATERPROOF* shock protected, dust-protected! Chrome steel case and combination expansion band, with lizard leather insets. 17 Jewels. Radium hands and figures. 2383HK1595... Retail \$57.50
- 21 Jewels. Waterproof* with Incabloc shock-protected. Radium hands, textured dial. Yellow rolled gold plate case, stainless back. Gold-filled expansion bracelet. Dust-protected case. 2384HK2565... Retail \$75.00

Hallmark 17, 21** and 25** JEWEL WATCHES Shock-Protected by INCABLOC

**SAME
HIGH QUALITY!
NEW
LOW PRICES**

*As long as case, crown and crystal are intact.

**Including RESEVOIL oil-reserve jewels. Reservoir (U.S. Pat. No. 278865) adds extra ruby jewels to the regular 17 friction bearing jewels of a Hallmark movement to give you the superior performance of a 21 or 25 jewel watch without adding to the complexity of the fine movement.

RETAIL
\$85.00NOW ONLY
\$26.60

Self-winding waterproof*! 17 Jewel movement with a chrome steel case, combination expansion band. Textured dial. 2385HK2660... \$85.00

RETAIL
\$95.00NOW ONLY
\$28.50

Black dial in a 17 Jewel self-winding waterproof* watch. Yellow gold cold case, stainless back. EX- 2386HK2850... \$95.00

Hallmark Ex B-10

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FEDERAL TRADE COMMISSION
DOCKET NO. 8396
COMMISSION EXHIBIT NO. 96-Q

BEST COPY

from the original

Commission Exhibit No. 119
Date 8/13/62

April 18, 1960

WALTHAM WATCH COMPANY
231 S. Jefferson Street
Chicago 6, Illinois

Attn: Advertising Manager

Catalog Dept.

Dear Sir:

Re: HALLMARK GIFT RINGS INSERT

Specifications for your insert for our catalog are attached and we have indicated our stock numbers to be imprinted. However, we are listing below a portion we consider repeating.

Quantity:	90,000
Trim Size	8 1/2 x 11"
Delivered Size:	8 3/3 x 11 1/2"
Binding Date:	July 5, 1960
Page Numbers:	257-258-259-260
Ship To:	CUNEO PRESS INC. 2242 So. Grove Street Chicago 16, Ill.

Mark each skid: For Smith Supply Company Catalog

Note: It is imperative we receive proofs showing our coding in position for our final approval.

It is also imperative that we receive BY RETURN MAIL THE INDIVIDUAL WEIGHTS OF ALL ITEMS TO APPEAR ON YOUR INSERT SHEET for our catalog.

Should you require any additional information, please feel free to contact us at any time.

Yours very truly,

SMITH SUPPLY COMPANY

/s/ Donald H. Arneson

Catalog Production Department

DA/ed

[Filed October 19, 1962]

INITIAL DECISION

By Herman Tocker, Hearing Examiner

Harry E. Middleton, Jr., Esq., of Washington, D. C.
for the Commission

Ben Paul Noble, Esq., of Washington, D. C.
for the Respondents

In a complaint issued May 15, 1961, the Federal Trade Commission charged Waltham Watch Company, a Delaware corporation, and its officers, Harry Aronson, Ben Cole and Morris Draft, both individually and as officers, with engaging in unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. The acts complained of were related to the sale and distribution of watches by the respondents. In general, they were charged with deceptive pricing activities, false representations as to guarantee and jewel content of watches and deceptive use of the Waltham name.

In their answer, the respondents denied generally the allegations of the complaint. They asserted also that they were defending prior Commission proceedings involving identical issues and thus were subjected to a multiplicity of law suits and harassment.

Waltham Watch Company actually was a respondent in two other cases then pending before the Commission.

In one, Docket No. 6914, it was joined with others not parties to this proceeding. Aronson, Cole and Draft were not respondents there. That case was concerned with alleged deceptive practices involving the jewel content of watches and the use of the name "Waltham". It was decided adversely to the respondents there by the Commission on July 20, 1962.

The other case, Docket No. 7997, was brought against Waltham and Aronson. Other respondents in that case are not respondents here.

Ben Cole and Morris Draft, respondents in this case, were not charged there. It was concerned with, among other things, the alleged deceptive use of the name "Waltham" in the sale of clocks. It was decided adversely to the respondents there by the Commission on June 15, 1962.

Waltham's present officers, the individual respondents here, are admittedly responsible for its most recent business practices. Even though the use of the name "Waltham" was involved in the other cases and jewel content was involved in one of them, this case need not be regarded as a repetition of the prior litigation nor as an unwarranted harassment. Since the individual respondents constitute new management of Waltham and the effect of the allegations was that they were persisting as such in Waltham's prior practices, some of which had been litigated in the other cases, it seems proper that Waltham be joined as a respondent with them. We are here concerned with their conduct in their administration of Waltham's activities. (The fact that Aronson also was a party in Docket No. 7997, involving, among other things, the Waltham name, does not alter this. That was the case concerned with clocks as distinguished from watches.)

Moreover, there is more to this proceeding than jewel count and use of the Waltham name. As stated above, this proceeding is concerned also with alleged deceptive price practices and claimed false guarantees. These last were not involved in the prior cases as far as Waltham and Aronson were concerned.

Together with their submission of proposed findings of fact, conclusions of law and order, respondents have filed a formal "Motion to Dismiss Paragraphs 5, 6, 7 and 8 (in part)" of the complaint. While the Hearing Examiner has some doubt whether he could consider a motion such as this, which attacks the Commission's exercise of its discretion to issue the complaint in this proceeding while the two prior proceedings were pending, in view of the outcome of those proceedings and the action to be taken by the Hearing Examiner in this proceeding, he concluded that respondents' motion need not be decided. To the extent that

Waltham Watch Company already is subject to an order of this Commission requiring it to cease and desist from practices related to jewel count and use of the Waltham name, the Hearing Examiner will not duplicate such order or orders by any action here. He believes that one Commission order directing that a party cease and desist from a particular action is sufficient and it is not necessary that an additional order issue providing the same remedy. In a sense, this appears to be the relief sought by respondents in, and the only purpose, of their formal motion.

The Pretrial Order, the Hearing Examiner's certification to the Commission and the Commission's approval of the Hearing Examiner's recommendation that he be permitted to hear this proceeding first in Chicago, then in Milwaukee, then in Minneapolis, and finally again in Chicago, all were predicated on the expectation that the issues herein would be litigated bitterly and that hurried trips would be made from city to city in order expeditiously to complete the proceeding. However, on the day that the Hearing Examiner left Washington to commence the hearing, he received the decision and opinion of the Commission dated July 20, 1962, in the case bearing Docket No. 6914. These became available to all counsel on the morning set for the opening of the hearing. That decision clearly and definitely ruled that Waltham Watch Company was to cease and desist misrepresenting the jewel content of watches and using the name "Waltham" without clearly stating the country of origin of its watches or using the Waltham name in a historical sense for the purpose of describing its watches. In addition, Commissioner Philip Elman in the opinion stated,

Respondents should be prohibited from using the term "American", or any reference to "Waltham", in any manner or context suggesting that the watches which they sell under the Waltham name are made in the United States. To provide effective relief these provisions are necessary at least until such time as the

harmful effects of respondents' deceptive advertising have been erased. If and when this has been accomplished, the Commission will entertain any application for such modification as may then be appropriate. Cf., Federal Trade Commission v. National Lead Co., 352 U.S. 419.

Respondents appear to have been very much impressed by the possibility that an application for modification at some future time might receive favorable consideration and, in their defense of the instant proceeding, apparently began to lay the groundwork for a demonstration of good faith by cooperating most commendably in the simplification of the issues and the elimination of evidence which would have been necessary to bring the individuals within the restrictions of the order already effective against Waltham. This resulted in more leisurely sessions than had been anticipated.

They have stipulated sufficient to justify the issuance in this proceeding of an order against them similar to that entered against Waltham in the case bearing Docket No. 6914. It should be observed, however, that while their stipulation of facts is sufficient to permit the issuance of such an order in this proceeding, they do not agree thereby, as a matter of law, that, upon the facts stipulated, the order is right.^{1/} They assume also that, regardless of whether it is right or not, if, in the future, the

^{1/} On the legal justification for the jewel count ruling, the Commission's prior decisions and Allen v. Tornek Company, 276 F.2d 513, 107 App. D.C. 267, all cited by Commissioner Elman in Docket No. 6914, are conclusive. As to the use of the Waltham name, apart from what was said by Commissioner Elman in his opinion in Docket No. 6914 above, respondents' argument that the owner of a trademark has the right to cheapen or "water it down" leaves this Examiner unimpressed. It ought to be quite clear that, regardless of what trademark a business may own, it cannot use that trademark for the purpose of deception. How long would any man whose own true name was Howard Johnson be permitted to operate a roadside restaurant and call it "Howard Johnson's" without qualification? Would any clothier who happened to have a customer, James F. King, get away with advertising during the John F. Kennedy administration that JFK buys his clothes there?

Waltham order be modified or suspended, they will receive the same treatment and have the benefit of such modification or suspension. (In this connection it should be noted clearly that whether this is to be done is not at all the function or concern of the Hearing Examiner, but the sole prerogative of the Commission.)

This leaves for consideration in this proceeding only the issues involving alleged deceptive pricing and alleged false guarantee. The deceptive pricing portion of the case is concerned with (a) advertising by respondents of published "list" or alleged "retail selling prices" separately from or in catalogue sheets prepared for the use of catalogue companies such as are described at some length by Commission Chairman Paul Rand Dixon, in his opinion in Leeds Travelwear, Inc., Docket No. 8140, October 3, 1961, slip printing pages 4 to 7 inclusive, and, (b) with the tagging, affixing or use of price tickets on or in connection with the watches in the form or package in which they are offered and delivered for sale. The evidence as to the deceptive nature of the advertising and use of the list prices, whether the same be in general advertising, in catalogue sheets or in the form of preticketing, is adequate and sufficient to support remedial action in this proceeding. A long dissertation is not necessary here. Numerous witnesses testified, and it is clearly to be concluded from their testimony, that Waltham watches are customarily sold at prices far below (a) the advertised prices, (b) the alleged or stated "retail price" in the catalogue sheets prepared by respondents for the use of catalogue houses, and (c) the prices on the tickets or labels attached to or packaged together with the watches when offered and delivered for sale. Respondents' officers, the individuals involved herein, have too long an experience and background in business, particularly the watch business, not to be fully aware of the manner in which the business of the catalogue houses is conducted. They know, as the witnesses testified here, almost anyone who knows about and has the desire so to do (a) can obtain access to a catalogue house and (b) can purchase any article offered by the catalogue house at

the coded price rather than at the so-called or represented "retail price". The Hearing Examiner believes that, separate and apart from this litigation, the individuals involved herein certainly would be embarrassed or outraged if it were suggested that they were so naive that they did not have this awareness or did not know how the catalogue houses for which they supply the catalogue insert sheets operate. Leeds Travelwear, Inc., Docket No. 8140, Rayex Corporation, Docket No. 7346, Baltimore Luggage Co. v. Federal Trade Commission, Docket No. 8382, C.A. 4, 296 F.2d 608, Cert. Den'd, 369 U.S. 860, Clinton Watch Co. v. Federal Trade Commission, 291 F.2d 838, C.A. 7.

To the extent that respondents urge that the prices advertised by them should be regarded only as "suggested retail prices", their position is rejected. Their argument seems to be pitched at this Hearing Examiner's reasoning in his Initial Decision in the Regina case, November 16, 1961, which was not adopted by the Commission.* Nevertheless, the facts in this case are not at all similar. In Regina there was no advertising or preticketing. In this case there are both. It also is clear that the respondents here knew that their "list prices" were not the usual and customary retail prices. Since, with that knowledge, they furnished and disseminated to vendors advertising containing such prices, they thereby placed in the hands of their vendors the means whereby the public was misled and deceived. This case is aggravated far beyond the Regina case as far as the respondents are concerned. Their apologia that they cannot control the prices at which their watches are sold does not absolve them from the consequences of their own conduct. While there is testimony that the "retail" prices were only "suggested", the facts are to the contrary.

This leaves only the charge with respect to the alleged false guarantee. The testimony and physical exhibits show that the respondents advertised their watches as "Guaranteed", "Fully Guaranteed" and "Lifetime Guaranteed". It was advertising such as this that, in many cases, induced the purchaser to buy one of respondents' watches. This

* The Regina Corporation, Docket No. 8323, June 13, 1962.

sort of guarantee was featured prominently on all the catalogue sheets. Two propositions of law are elementary. If, at the point when a decision to buy is made, the decision is brought about by a false or deceptive statement, the deceptive practice must be stopped. The word "guarantee" must be accompanied by clear and conspicuous words of limitation if the guarantee is in any way limited, even to the extent of a small fee such as a handling charge. Here, in most instances, the vice was greater. A potential customer, turning the extent that any proposed finding or conclusion is not adopted, either directly or in substance, the same has been rejected because of irrelevance, immateriality or lack of support in the evidence, as contrary to law, or as unnecessary.

After careful consideration of the entire record, the following are my

FINDINGS OF FACT

1. Respondent Waltham Watch Company (hereafter "Waltham") is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 231 South Jefferson Street, Chicago, Illinois.

2. During some of the time involved herein, the individual respondents, Harry Aronson, Ben Cole and Morris Draft were officers of Hallmark, Inc. a corporation which had been organized under the laws of the State of Illinois and had its office and principal place of business located where Waltham is now located. Hallmark, Inc. was merged into Waltham in June 1959.

3. The individual respondents thereupon became and have continued to be officers of the corporate respondent. They formulate, direct and control its acts and practices and they formulated, directed and controlled the acts and practices of Hallmark, Inc. prior to the merger. Their offices and principal place of business are the same as that of Waltham.

4. In the course and conduct of their business, respondents import watches, watch movements, cases and attachments, assemble and

sell them. Respondents cause such products, when sold, to be transported from the State of Illinois and elsewhere to purchasers located in various other States of the United States and in the District of Columbia.

5. Respondents have maintained a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

6. Respondents have engaged in the practice of attaching or causing to be attached price tickets to their products. A price ticket is a label or tag upon which an amount in dollars and cents or dollars alone is printed for exhibition to or view by a prospective customer of the article being offered for sale. Such amount is a representation to the prospective customer that the article is reasonably worth the amount shown and that it is usually sold at that price.

7. Respondents also have disseminated or caused to be disseminated price lists, catalogue insert sheets, brochures, leaflets, newspaper and magazine advertisements and other forms of advertising in which certain amounts are shown as the retail prices of their products.

8. Respondents represent directly or indirectly by such materials that the amounts shown are the usual and regular retail prices.

9. In truth and in fact the prices on the tickets and in the materials mentioned are in excess of the prices at which said watches usually and customarily are sold at retail and are fictitious retail prices.

10. Respondents, in their advertising, catalogues, brochures and other promotional material, represent that their products are "Guaranteed", "Fully Guaranteed" or "Lifetime Guaranteed".

11. In truth and in fact such representations as to guarantee are false, misleading and deceptive because, only after having purchased a watch, if the purchase be made by mail, or only after having carefully read the guarantee certificate which accompanies the watch at the time of purchase or after the purchase, if the purchase be made over the counter, is the customer informed of the fact that the guarantee is a limited guarantee and that a service charge is required to be paid by the

customer incident to the performance of the guarantee, as limited.

12. The respondents purchase 17-Jewel watch movements, made in and imported from Switzerland, add a device containing 4 or 8 synthetic jewels, affix attachments to the watches and case the movements. The watches are then represented, advertised, offered for sale, and sold by respondents as "21" or "25" Jewel Watches to retailers, catalogue houses and wholesale distributors.

13. By means of the statements that the said watches are 21 and 25 jewel watches, respondents represent that they contain 21 or 25 jewels, each of which serves a mechanical purpose as a frictional bearing and that each jewel provides mechanical contact at a point of wear. In fact, the additional jewels in the device added by the respondents are not functional and the watches are not 21 and 25 jewel watches as represented.

14. The respondents have advertised their watches in newspapers, jewelers' trade magazines, nationally distributed magazines, catalogues, catalogue insert sheets and circulars, and on labels and packages. Among and typical but not all inclusive of the statements appearing in such advertising material have been the following:

"Waltham Watches—timing the nation since 1850"

"Waltham Premier, a famous name, part of the American scene since 1850".

15. By means of such statements, respondents have represented directly or by implication that their watches are manufactured in the United States by the same Waltham Watch Company of Waltham, Massachusetts, which had been an old and well-known company and that they were the same interests which had controlled that company during times long prior to the acquisition by them of their control of the name thereof. Such statements are false, misleading and deceptive. In truth and in fact (a) such watches are not manufactured in the United States, (b) are not manufactured by what had been the old and well known Waltham Watch Company of Waltham, Massachusetts, and (c) respondents

acquired only recently control of a company which had been incorporated in Delaware in 1957 under the name "Waltham Watch Company" to acquire assets involved in a "spin off" from the old Waltham Watch Company of Massachusetts.

16. By the said acts and practices respondents have placed in the hands of retailers and others means and instrumentalities whereby such retailers may mislead and deceive members of the purchasing public as to the regular and usual retail prices, the character of the guarantee, the number of frictional bearing jewels and the origin and manufacturer of respondents' watches.

17. Respondents in the course and conduct of the sale of their watches have been and are in substantial competition in commerce with other corporations, firms and individuals engaged in the manufacture, sale and distribution of watches.

18. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had and now has the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken beliefs that they are true and into the purchase of substantial numbers of their watches in consequence of such erroneous and mistaken beliefs. Substantial trade in commerce has been unfairly diverted thereby to the respondents from their competitors and substantial injury has been done to competition in commerce.

From all of which and upon the whole record I have made the following

CONCLUSIONS

A. That all the respondents, whether charged in their corporate, official or individual capacities, are engaged in the business of importing, assembling and distributing in commerce, watches from Switzerland and that the individual respondents are responsible for the acts and practices of the corporate respondent and for the acts and practices set forth above.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

C. This proceeding is in the interest of the public.

D. The activities of the respondents, as more particularly set forth in the Findings of Fact, constitute unfair and deceptive acts or practices in violation of the Federal Trade Commission Act.

E. The order hereinafter set forth is necessary and reasonable to effectuate the purposes and policy of that Act.

ORDER

IT IS ORDERED that respondents, Harry Aronson, Ben Cole, and Morris Draft, individually and as officers of Waltham Watch Company, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or indirectly, including any use of a number in the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.
2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

3. Using, in advertising or labeling watches manufactured or sold by them, the terms "Waltham Watches — timing the nation since 1850", "Waltham Premier, a famous name, part of the American scene since 1850.", or any similar word or expression, to describe respondents or such watches.
4. Furnishing any means or instrumentality to others whereby the public may be misled as to any of the matters or things prohibited by the above provisions of this order.

IT IS FURTHER ORDERED that Waltham Watch Company, a corporation, and its officers and Harry Aronson, Ben Cole and Morris Draft individually and as officers of said corporation and their agents, representatives and employees, directly or through any corporate or other device in connection with the sale and distribution of watches or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of pre-ticketing merchandise at an indicated retail price when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area where offered for sale or when there is no generally prevailing retail price for such merchandise in such trade area.
2. Supplying to, or placing in the hands of, any distributor, dealer or other purchaser, catalogue sheets or other materials which are displayed to the purchasing public and which contain an indicated retail price for respondents' merchandise when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area where offered for sale or when there is no generally pre-

vailing retail price for such merchandise in such trade area.

3. Representing that their merchandise is guaranteed unless the nature, extent and conditions of the guarantee and the manner in which the guarantors will perform thereunder are clearly set forth in conjunction with the representation of guarantee.
4. Furnishing to others any means or instrumentality by or through which the public may be misled as to the generally prevailing retail prices of respondents' merchandise or the terms of any claimed guarantee affecting the same.

/s/ Herman Tocker

Herman Tocker,
Hearing Examiner.

October 18, 1962.

[Filed November 19, 1962]

PETITION TO REVIEW

Come now the respondents by counsel and petition the honorable Commissioners of the Federal Trade Commission for an order granting review of the Initial Decision of the Hearing Examiner herein issued on the 18th day of October, 1962.

QUESTIONS PRESENTED

1. Is there sufficient evidence to support the order proposed by the examiner?
2. Is the proposed order contrary to law?
3. Whether, as found by the examiner (Proposed Finding 6) the affixing of a price tag to a product "is a representation to the prospective customer that the article is reasonably worth the amount shown, and that it is usually sold at that price?"
4. Whether price lists such as were circulated by respondents contained retail prices (Proposed Finding 7) or merely "suggested" retail prices?
5. Whether suggested retail prices as used by respondents constitute, as found by the examiner (Proposed Finding 8), representations that the amounts shown are the usual and regular retail prices?
6. Whether there is sufficient evidence to support Finding 9 that is, that respondents' ticketed prices are fictitious and in excess of prices at which watches are usually and customarily sold?
7. Whether Finding 11 is supported by the evidence adduced at hearings with reference to the guarantee practice of respondents?
8. Whether there is any evidence to support findings 13-18?
9. Whether the Commission can, as proposed, issue an order against these respondents, which is redundant and repetitive of similar orders issued in other proceedings before the Commission (Dockets 6914 and 7997)?

10. Whether the issuance of repetitive complaints repeating identical charges and the subsequent entry of orders based upon each of them is a violation of due process of law?

11. Whether the order proposed, if adopted, would be arbitrary and capricious in whole or in part?

THE FACTS

The Complaint herein issued May 15, 1961, charging respondents with engaging in unfair and deceptive acts and practices in commerce, as to (1) prices, (2) jewel content of watches, (3) use of trade name Waltham, and (4) guarantees.

After hearings in Chicago, Milwaukee, and Minneapolis, all parties submitted proposed findings, etc., and on October 18, 1962, the examiner issued his initial decision.

The Commission has already entered its final order in other matters (Dockets 6914 and 7997) in which the respondents' use of their trade name and representations as to the jewel content of watches were issues.

The orders in those two cases are being appealed to the 7th Circuit Court of Appeals.

The Waltham Watch Company is the corporate successor to the private enterprise started in 1849 in Waltham, Massachusetts, by Aaron Dennison.

It was born of a corporate re-organization known as a "spin off" which separated the two divisions of the Massachusetts corporation that had been organized to succeed the private enterprise in 1923. The Massachusetts corporation changed its name to the Waltham Precision Instrument Co. and the "spin off" company became a Delaware corporation engaged in the watch business.

The corporate respondent (the Delaware corporation) by virtue of assignments acquired all rights to the trade mark and trade name, Waltham.

Waltham, had acquired by 1898, a secondary meaning when used on watches. If it had not, no trade mark could have existed to be assigned to respondent corporation.

The owner of a geographic trade name such as Waltham, can transfer it, assign it, license it, and may move the situs of the business from the locale of its primarily geographic meaning and continue to use it, once it has acquired secondary meaning.

"Waltham", when used on watches does not mean made in Waltham, Massachusetts, U.S.A., but watches sold by the owners of the trade mark and trade name, Waltham.

Some of their watches, respondents represent to contain 21 and 25 jewels and many of such watches contain Resevoil, a patented device containing 4 or 8 jewels which, when affixed to traditional 17 jewel movements, do not touch any moving part at a point of wear.

These Resevoil jewels are functional as oil reserve jewels and are composed of the same material as other watch jewels.

The Commission defines a watch jewel archaically as a synthetic stone which, in a watch, serves the function of providing a mechanical contact at a point of wear, or serves a mechanical purpose as a frictional bearing.

Respondents urge that the definition is obsolete and as applied frustrates the purposes of the Patent Laws.

Respondents pre-ticket their watches with price tags. The prices suggested are retail prices, they have no control over the actual prices at which their watches are sold. The suggested retail prices are based upon competitive factors and cost.

Respondents perform their guarantee as written and as represented.

REASONS WHY REVIEW BY THE COMMISSION IS DEEMED TO BE IN THE PUBLIC INTEREST

1. Petitioner is the owner of several trade marks which constitute valuable property right guaranteed by the provisions of the Lanham

Act. The effect of the initial decision, if adopted, will constitute an excision of respondents trade marks and the restrictions upon use of trade marks will constitute a denial of due process of law.

2. The proposed order is so broad in its scope as to constitute an arbitrary and capricious denial of due process of law.

3. The redundant and repetitive entry of orders against these respondents based upon three complaints all involving, in part, the same charges, is contrary to law and a violation of due process of law.

4. A substantial public interest requires that the Commission grant review of the Initial Decision here, particularly with reference to the entry of an order merely repetitive of other orders now subject of several appeals.

WHEREFORE, the premises considered, respondents pray that this petition for review by the Commission be granted.

Respectfully submitted,

/s/ B. Paul Noble

B. Paul Noble

Attorney for Respondents

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Dated: November 19, 1962

[Issued: February 28, 1964]

**DECISION OF THE COMMISSION AND
ORDER TO FILE REPORT OF COMPLIANCE**

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondents and counsel supporting the complaint, and having determined that the hearing examiner's findings of fact and order should be modified and that respondents' appeal should be denied:

IT IS ORDERED that the initial decision be modified by striking therefrom findings of fact numbered 8 and 9 on page 9 and substituting the following:

8. Respondents represent directly or indirectly by such materials that the amounts shown have been established in good faith as an honest estimate of actual retail prices which do not appreciably exceed the highest prices at which substantial sales of their watches are made in their trade territory.

9. In truth and in fact respondents know that the retail prices set forth on catalog sheets and tickets attached or accompanying watches furnished by them to catalog house customers are appreciably in excess of the highest price at which substantial sales are made in their trade area by those customers. Thus, these retail prices are not disseminated in good faith as an honest estimate of the actual retail selling price of catalog house customers. This practice is dealt with in Guide III of the Commission's revised Guides Against Deceptive Pricing. To provide guidance and assistance to respondents in compliance, an order to cease and desist will be entered in the language of Guide III.

IT IS FURTHER ORDERED that the order contained in the initial decision be, and it hereby is, modified to read as follows:

IT IS ORDERED that respondents, Harry Aronson, Ben Cole, and Morris Draft, individually and as officers of Waltham Watch Company, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or indirectly, including any use of a number in the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.
2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.
3. Using, in advertising or labeling watches manufactured or sold by them, the terms "Waltham Watches—timing the nation since 1850", "Waltham Premier, a famous name, part of the American scene since 1850", or any similar word or expression, to describe respondents or such watches.
4. Furnishing any means or instrumentality to others whereby the public may be misled as to any of the matters or things prohibited by the above provisions of this order.

IT IS FURTHER ORDERED that Waltham Watch Company, a corporation, and its officers and Harry Aronson, Ben Cole and Morris Draft, individually and as officers of said corporation,

and their agents, representatives and employees, directly or through any corporate or other device in connection with the sale and distribution of watches or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising, disseminating or distributing any list, pre-ticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area.
2. Representing that their merchandise is guaranteed unless the nature, extent and conditions of the guarantee and the manner in which the guarantors will perform thereunder are clearly set forth in conjunction with the representation of guarantee.
3. Furnishing any distributor, dealer or retailer with any means whereby to deceive the purchasing public in the manner forbidden by the above provisions of this order.

IT IS FURTHER ORDERED that the hearing examiner's initial decision, as modified herein, be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that Waltham Watch Company, a corporation, and Harry Aronson, Ben Cole and Morris Draft shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Reilly not participating for the reason that he did not hear oral argument.

SEAL

ISSUED: February 28, 1964

/s/ Joseph W. Shea

Joseph W. Shea,
Secretary.

BRIEF AND APPENDIX FOR RESPONDENT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18647

WALTHAM WATCH COMPANY, A CORPORATION, AND
HARRY ARONSON, BEN COLE AND MORRIS DRAFT, IN-
DIVIDUALLY AND AS OFFICERS OF SAID CORPORATION,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE
COMMISSION

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United States Court of Appeals

for the District of Columbia Circuit

FILED DEC 8 1964

Nathan J. Paulson

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Pursuant to the stipulation as to issues approved by order of this Court on June 24, 1964, the following questions are presented as controlling in this proceeding:

1. Is there substantial evidence in the record to support the findings of the Commission that petitioners have falsely represented that their watches are manufactured in their entirety in the United States by the original Waltham Watch Company of Massachusetts?

2. Is there substantial evidence to support the findings of the Commission that petitioners have falsely advertised the number of jewels in their watches which serve the purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear?

3. Is there substantial evidence in the record to support the findings of the Commission that petitioners furnish vendors with preticketed, list, or advertised retail prices, which have the tendency and capacity to mislead and deceive the public as to the actual retail prices of petitioners' watches?

4. Is there substantial evidence in the record to support the findings of the Commission that petitioners' advertisements of guarantee have the tendency and capacity to mislead and deceive the public as to the nature, extent, conditions, and manner of performance of petitioners' watch guarantees?

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* Authorities chiefly relied upon are marked by asterisks.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18647

WALTHAM WATCH COMPANY, A CORPORATION, AND
HARRY ARONSON, BEN COLE AND MORRIS DRAFT, IN-
DIVIDUALLY AND AS OFFICERS OF SAID CORPORATION,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE
COMMISSION

BRIEF AND APPENDIX FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

This case comes before the Court upon a petition to review an order issued by the Federal Trade Commission at the close of an administrative proceeding on a complaint charging petitioners with unfair and deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.¹

¹ Pertinent provisions of the Act are:

"Sec. 5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce,

Proceedings before the Commission

The Commission issued its complaint on May 15, 1961, against the Waltham Watch Company, a corporation, and Harry Aronson, Ben Cole and Morris Draft, individually and as officers of said corporation. The complaint (JA 1-6)² alleged that Waltham Watch Company is a Delaware corporation with its office and principal place of business located in Chicago, Illinois; that Aronson, Cole and Draft were officers of Waltham Watch Company and Hallmark, Inc., an Illinois corporation which has been merged into the corporate petitioner; and that the individual petitioners formulate, direct and control all the policies, acts and practices of the corporate petitioner. It was also alleged that petitioners import watches, watch movements, cases and attachments for assembly and sale in interstate commerce; that they attach fictitious price tickets to their watches; and that they disseminate price lists, catalogs, catalog sheets, brochures hereby declared unlawful." 66 Stat. 632, 15 U.S.C. 45(a) (1).

"Sec. 5(a)(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 66 Stat. 632, 15 U.S.C. 45(a)(6).

"Sec. 5(c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 52 Stat. 113, 15 U.S.C. 45(c).

² Abbreviations: "JA" — printed joint appendix; "Tr." — transcript of testimony, unprinted; "CX" — Commission's exhibit; "RX" — petitioners' exhibit; "Br." — petitioners' brief; "Pet. Apdx." — petitioners' appendix. Petitioners have not included this Court's order of June 24, 1964, and the stipulation of issues dated June 16, 1964, in the joint appendix; so we have printed them herein in Appendix A.

chures, leaflets, and newspaper and magazine advertisements which misrepresent the actual, regular and usual retail prices of Waltham watches. The complaint further averred that petitioners misrepresent their watches as "guaranteed," "fully guaranteed" or "lifetime guaranteed"; that they misrepresent the actual jewel content of their watches; that they fail to disclose the foreign origin of their watches; and that they falsely represent that their watches are manufactured in the United States by the old and well-known Waltham Watch Company of Waltham, Massachusetts.

Petitioners were also charged with placing in the hands of retailers and others the means and instrumentalities to mislead and deceive the purchasing public. The complaint alleged that these practices were misleading and deceptive and had a tendency and capacity to mislead and deceive members of the purchasing public and, accordingly, constituted unfair and deceptive acts and practices and unfair methods of competition in violation of the Federal Trade Commission Act.

Petitioners' answer denied every allegation of the complaint (JA 6-7). Hearings were held before an examiner, who thereafter rendered an initial decision (JA 106-16), wherein he found that the allegations of the complaint were fully sustained by the evidence and concluded that petitioners' acts and practices were unfair and deceptive and violated the Federal Trade Commission Act. He thereupon issued an order to cease and desist. Petitioners appealed to the Commission from the initial decision, and, after a

hearing on briefs and oral argument, the Commission modified the examiner's initial decision and, as modified, adopted all parts thereof except the cease and desist order contained therein. The Commission then issued its own order to cease and desist (JA 123).

The stipulated and undisputed facts

This is the third Waltham proceeding within two years to come before an appellate court. The two previous cases where Commission orders were affirmed and enforced, are *Waltham Precision Instrument Co., Inc. v. Federal Trade Commission*, 327 F. 2d 427 (7th Cir. 1964) and *Waltham Watch Co. v. Federal Trade Commission*, 318 F. 2d 28 (7th Cir. 1963). The corporate petitioner here was a party to each of these proceedings. The factual situation here, with respect to the jewel and trade name issues, is identical with that already adjudicated in the *Waltham Precision Instrument Co.* case and, in fact, petitioners have stipulated that the facts adduced in that case can serve as a basis for a decision as to whether a cease and desist order should be issued against individual petitioners Aronson, Cole and Draft who were not parties there (JA 39, 55-58).³ The facts found there and stipulated into the record here can be summarized as follows for the benefit of this Court.

Waltham Watch Company, a Massachusetts corporation, had been a widely known manufacturer of watches and clocks for many years in Waltham, Massachusetts. In 1956, it ceased manufacturing watches

³ The corporate petitioner herein is already subject to an order affirmed by that court concerning watch jewels and the Waltham trade name.

there. It opened an office in New York City and began assembling watches from watch movements purchased from Switzerland and watch cases from both Switzerland and the United States (JA 60-61).

In 1956, Joseph and Melvin Axler, and others associated with them, acquired control of this corporation. As officers and directors, they formulated and controlled the policies and practices of the corporation. In the same year the Massachusetts corporation licensed Hallmark, Inc., to use the trademark "Waltham" on watches sold by it in the United States.

About July 1957, Waltham Watch Company, by means of a "spin-off," transferred its *watch business* to a new Delaware corporation which adopted the same name. Its office and principal place of business was in New York City. Joseph and Melvin Axler were officers and directors of the Delaware corporation and controlled its operation.

The Massachusetts corporation was renamed Waltham Precision Instrument Company, Inc. It continued in business in Waltham, Massachusetts, engaging in the manufacture of various precision instruments, *other than watches*.

In 1959, Waltham Watch Company of Delaware was merged with Hallmark, Inc., under the name of Waltham Watch Company. The offices were transferred to Chicago, Illinois. At that time the Axlers terminated their association with the company, and petitioners Aronson, Cole and Draft succeeded them as officers in directing, formulating and controlling

the business policies and acts and practices of the Delaware corporation (JA 55-58).

It was stipulated that petitioners Aronson, Cole and Draft are responsible for all the corporate petitioner's practices including its advertising and labeling policies (JA 39, 55-58, 59). Typical of such advertisements, in addition to those set forth in the complaint here, are the following:⁴

"Waltham Premier 25."

"The 25-jewel Premier by Waltham."

"The 25-jewel Premier group has patented oil reserve jewels, a horological development that adds 8 extra ruby jewels to the customary 17 friction-bearing jewels."

"Watches that are worthy successors to the famed, history rich Waltham creations of the past 107 years."

"Presenting the 25 Jewel Premier by Waltham * * * America's first watch."

"Introducing * * * your new Waltham watch * * *. It is made by expert watch makers * * * and embodies the skills developed during Waltham's 102-year existence. Nowhere in the world are there better equipped or more thoroughly experienced craftsmen."

"Waltham, the first American watch company." [*Waltham Precision Instrument Co., Inc. v. Federal Trade Commission*, 327 F. 2d at 430.]

⁴ See JA 103; CXs 22, 25, 26, 27, 60, 96J-M, S-Z, 132 for other Waltham advertisement phrases like: "Made in America": "America's First Watchmakers since 1850": "Waltham Watches—Timing the Nation Since 1850": and "Waltham Premier, a famous name, part of the American scene since 1850."

Petitioners' watches contain only 17-jewel movements *imported* from Switzerland. To these movements have been added a so-called "Resevoil" device containing four or eight additional synthetic stones. Petitioners then sell and represent their watches as "21" or "25" jewel watches. The Resevoil device is patented and consists of a small metal plate containing the jewel-like stones whose function is to lubricate pivots or other moving parts of the watch. They do not touch any moving part nor do they serve any mechanical function as a friction bearing.

To be designated a "jewel" in the watch industry, a stone must serve a mechanical function of a friction bearing at a point of wear. Based upon petitioners' stipulation, which eliminated the necessity to adduce evidence identical to that above recited, the Commission issued an order against petitioners Aronson, Cole and Draft which was, as far as jewel content and the use of the name Waltham was concerned, substantially the same as the one outstanding against the corporate petitioner and affirmed by the Seventh Circuit in *Waltham Precision Instrument Co., supra*.

With the facts stipulated as to jewel content and the Waltham trade name, the examiner proceeded to make findings upon the challenged practices of fictitious pricing and misrepresentation of guarantee based on the evidence adduced. Petitioners attach price tags or labels to their watches. They also disseminate price lists, catalog sheets, brochures, leaflets and newspaper and magazine advertisements which represent certain prices to be the actual retail prices of their products. It was found, however, that Wal-

tham watches are customarily sold at prices far below either petitioners' advertised retail prices, the prices in their catalog sheets or the prices placed on the tickets or labels attached to their watches. The Commission concluded that (JA 123):

* * * [Petitioners] represent directly or indirectly by such materials that the amounts shown have been established in good faith as an honest estimate of actual retail prices which do not appreciably exceed the highest prices at which substantial sales of their watches are made in their trade territory.

* * * In truth and in fact [petitioners] know that the retail prices set forth on catalog sheets and tickets attached or accompanying watches furnished by them to catalog house customers are appreciably in excess of the highest price at which substantial sales are made in their trade area by those customers. Thus, these retail prices are not disseminated in good faith as an honest estimate of the actual retail selling price of catalog house customers.

Petitioners were further found to be advertising their watches in catalogs, brochures and other promotional material as "Guaranteed," "Fully Guaranteed" or "Lifetime Guaranteed." The guarantee was found to be a limited one where a service charge was required to be paid by all purchasers to secure performance of petitioners' guarantee. Such limitations were not disclosed in petitioners' advertisements and representations of guarantee (JA 113-14).

The Commission's order (JA 123-25) prohibited the practices found to be unlawful.

SUMMARY OF ARGUMENT

1. The name Waltham has come to be associated by the public with watches manufactured by the famous old American company bearing the Waltham name. The advertisements involved herein refer to "Waltham" as "part of the American scene since 1850" and as "America's first watch." The movements of the watches so advertised, however, are not made in the United States but are imported from abroad. Such advertising of watches under a trade name long associated with entirely American-made products is deceptive. Although the trade name "Waltham" was legally acquired from the original owner, the owner of a trademark or trade name may not use, or permit the use of, such trademark or trade name in a manner to deceive the public.

2. The watches here involved contain 17-jewel movements imported from Switzerland. After importation, patented devices referred to as Resevoils, containing four or eight synthetic stones, are attached to the movements and the watches are thereafter represented as containing 21 or 25 jewels. The stones in the patented Resevoil device do not touch a moving part at a point of wear, and, as this Court has held, to properly designate a stone as a watch jewel such stone must serve the mechanical function of bearing friction. Since the stones in the Resevoil device admittedly do not come in contact with any moving part of the watch at a point of wear, the Commission properly found that to advertise and label their watches as 21- or 25-jewel watches was false and misleading.

The fact that the Resevoil patent describes the stones therein as jewels is not a license to advertise watches containing the device in any particular manner, and does not confer upon the owners of the patent the right to misrepresent the facts. In short, the letters patent do not cover advertising, and the proceedings before the Commission in the instant matter relate only to advertising and not to the validity of the patent granted.

3. Petitioners' practice of preticketing and advertising the retail prices of their watches at prices far in excess of the retail prices at which they know such watches are actually sold is unfair and deceptive and is identical to practices previously prohibited by this Court.

4. Petitioners' practice of advertising that their watches are "Fully Guaranteed," "Unconditionally Lifetime Guaranteed," etc., without disclosing the material limitations and conditions of their guarantee is patently unfair and deceptive.

ARGUMENT

Preliminary statement

The findings of the Commission, if supported by substantial evidence on the record considered as a whole, are conclusive. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 493-95 (1951). It is settled that courts do not pick and choose bits of evidence from the record to support findings of fact contrary to the Commission's findings. *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 117 (1937). Throughout their

brief petitioners assert that the Commission's findings are not supported by substantial evidence, but nowhere in their brief do petitioners set forth the record facts upon which the Commission relied in making its findings. Instead, petitioners refer to isolated fragments of testimony in support of their arguments. It is also well established that the "weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them," are for the Commission. *Federal Trade Commission v. Pacific States Paper Trade Ass'n*, 273 U.S. 52, 63 (1927); *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 760 (1945). "The possibility of drawing either of two inconsistent inferences from the evidence" does not prevent the Commission from drawing one of them. *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942). We submit that under these applicable principles the Commission's findings, conclusions, and order are proper in all respects.

I. There is substantial evidence to support the findings of the Commission that petitioners have falsely represented that their watches are manufactured in their entirety in the United States by the Waltham Watch Company of Massachusetts

While it was stipulated that the existence of "substantial evidence" would be the issue on this point, petitioners do not actually challenge any of the evidence relied on by the Commission. They "concede that part 3 of the portion of the Order relating to the individual petitioner is proper in the circumstances of this case" (Br. 11, n. 38). That para-

graph prohibits the individual petitioners from (JA 124):⁵

3. Using, in advertising or labeling watches manufactured or sold by them, the terms "Waltham Watches—timing the nation since 1850," "Waltham Premier, a famous name, part of the American scene since 1850," or any similar word or expression, to describe respondents or such watches.

Thus, they challenge only that portion of the order which requires that when the name "Waltham" is used to describe watches that are in whole or in part of foreign origin, such foreign origin shall be disclosed.

The facts relating to this issue are not in dispute. Petitioners admit (JA 39, 55-58) that the "Waltham Premier" watch was advertised in circulars distributed to the trade, in advertisements appearing in various periodicals and in nationally distributed magazines, and that such advertisements contain the representations set forth, *supra*, p. 6. The Commission found (JA 114-15) that those statements represented that petitioners' watches are manufactured in their entirety by the original Waltham Watch Company at Waltham, Massachusetts, and that such representations are false and misleading since the watch move-

⁵ As previously stated the corporate petitioner is subject to an order, which has been affirmed and enforced by the Court of Appeals for the Seventh Circuit (*Waltham Precision Instrument Co., Inc. v. Federal Trade Commission, supra*), prohibiting it from the deceptive use of the name "Waltham," from failing to disclose the country of origin of components of watches advertised as "Waltham" watches, and from misrepresenting the number of jewels in its watches. For these reasons the comparable portions of the order at issue here apply only to the individual petitioners.

ments and cases are purchased abroad, in Switzerland and elsewhere.

In support of their challenge, petitioners raise the same argument that was unsuccessfully raised in *Waltham Watch Co. v. Federal Trade Commission*, 318 F. 2d 28 (7th Cir. 1963) and *Waltham Precision Instrument Co., Inc. v. Federal Trade Commission*, 327 F. 2d 427 (7th Cir. 1964). In the former case, the court said (318 F. 2d at 31-32):

The pertinent principles of law are clear. The owner of a trademark or tradename may not use, nor permit the use of, such trademark or tradename in a manner designed to deceive the public. *Federal Trade Commission v. Winsted Hosiery Company*, 258 U.S. 483, 494 [1922] * * * *Edward P. Paul & Company, Inc. v. Federal Trade Commission*, * * * 169 F. 2d 294, 295-296 [D.C. Cir. 1948].

In the latter case, *Waltham Precision Instrument Co., Inc.*, the court summarized and rejected petitioners' argument as follows (327 F. 2d at 430-31):

Petitioners contend that the tradename "Waltham" originally meant watches made in Waltham, Massachusetts. By its long use, petitioners argue, it lost this geographic meaning and acquired a secondary meaning as being watches manufactured by the owner of that tradename; hence the Delaware corporation had the right to advertise the watches as "Waltham." This same argument was heard and laid to rest in a recent case in this court concerning the same Delaware corporation. *Waltham Watch Company v. F.T.C.*, 7 Cir.,

318 F. 2d 28, 31-32 (1963), *cert. denied* [375 U.S. 944] (December 9, 1963).

Any right petitioners have to use the trade-name "Waltham" does not permit its use "in a manner designed to deceive the public." and "[t]hose who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act. *Id.* at 31-32."

Thus, the court approved the Commission's finding that "[t]he watches were represented as being manufactured in their entirety in the United States by the well known and long established Waltham Watch Company, when in fact they were made up of watch movements manufactured in Switzerland and watch cases from either Switzerland or the United States" (327 F. 2d at 428-29); and the facts recited at pages 429-30 of the court's opinion are identical to those stipulated here. The court characterized petitioners' advertisements as "* * * knowingly false and misleading and * * * cunningly devised to deceive"* (318 F. 2d at 31).

* Petitioners' contention (Br. 19)—that an 1899 private suit by the original Waltham Watch Company makes the trade name issue *res adjudicata*—is truly astonishing. No similarity at all exists in fact or law. There, the company actually made watches in Waltham, Massachusetts. Here, petitioners import all watch components and still capitalize on old-line Waltham representations of American manufacture. Petitioners' own quotation refutes their position, for it is only permissible to "tell the world" they manufacture watches at Waltham, Massachusetts, if in fact they do. Petitioners' plethora of citations concerning secondary meaning and geographical significance of a trade name are totally inapposite. Such contentions have twice been laid to rest.

As to the remedy, the Commission held that deception of the public can be avoided only by requiring petitioners, wherever they use the distinctly American trade name "Waltham" in the advertising or labeling of their watches, to disclose, clearly and prominently, the foreign origin of any of the components thereof.⁷ Petitioners must be prohibited from using the term "American," or any reference to "Waltham," in any manner or context suggesting, contrary to fact, that the watches which they sell under the Waltham name are made in the United States.⁸ The order, in this respect, is identical to the order affirmed and enforced in the *Waltham Precision Instrument* case.

Finally petitioners argue (Br. 10, 12-14), relying upon an internal administrative bulletin, that since the entry of the order Commission policy toward the

⁷ Petitioners cannot seriously contest the propriety of labeling the components of a watch (*e.g.*, movement and case) with the country of origin since such disclosure has most recently been approved in *Delaware Watch Company, Inc. v. Federal Trade Commission*, 332 F. 2d 745 (2d Cir. 1964). None of petitioners' watches in evidence (see list, *infra*, p. 21) bears a visible disclosure of the country of origin on both the watch case and the movement.

⁸ Petitioners argue (Br. 17-18) that "Waltham" does not mean "made in U.S.A." and that the Commission is guilty of unfair interpolation and of promulgating a novel concept of law. This assertion is incredible in view of the fact that petitioners themselves have capitalized upon advertisements such as "Made in America" and "America's First Watchmakers since 1850" (*e.g.*, CX 96J; JA 103). See *supra*, p. 6, for a variety of statements inducing the public for years to identify the owner of the Waltham trade name as "Waltham, the first American watch company." Indeed, petitioners even admit (Br. 18) that "Waltham" "originally meant watches made in Waltham, Massachusetts."

marking of country of origin has changed, and as a consequence petitioners will be put at a competitive disadvantage with industry competition. Reference to paragraph 5 of the administrative bulletin (see Pet. Apdx. G) proves petitioners' arguments false. In the first place, Administrative Bulletin 64-10 is an internal memorandum directing the staff as to how it can best channel its time, effort and limited budget in the future, for considered protection of the public.⁹ Such determinations are discretionary matters decided *ex parte*,¹⁰ and "Courts will not ordinarily refuse to enforce valid administrative orders merely because the law is not being enforced against others." *The Regina Corporation v. Federal Trade Commission*, 322 F. 2d 765, 766 (3d Cir. 1963).

The time, money and effort has already been expended in the instant case and has resulted in a showing of misrepresentation and deception. The bulletin clearly has no application in such a situation, but, if the bulletin were controlling here, it would compel a proceeding against petitioners. This is a case where affirmative misrepresentations were made, and para-

* * * * [T]he Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 413-14 (1958).

¹⁰ Cf. *United States v. Morgan*, 313 U.S. 409 (1941); *Norris & Hirshberg, Inc. v. Securities & Exchange Commission*, 82 U.S. App. D.C. 32 (1947), 163 F. 2d 689; *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950); *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929); *Leighton v. Securities & Exchange Commission*, 95 U.S. App. D.C. 217 (1955), 221 F. 2d 91, cert. denied, 350 U.S. 825.

graph 4 of the aforesaid bulletin (Br. 13; Pet. Apdx. G) states:

4. Country-of-origin matters involving affirmative misrepresentation of country of origin are to be treated like other deceptive-practice matters.

The policy of the law to eliminate deception to the public caused by misrepresentation of country of origin has not changed, is still clear, and will be enforced in appropriate circumstances.¹¹

We submit that this Court should affirm the Commission's findings and order against petitioners Aronson, Cole and Draft for the same reasons that the Seventh Circuit affirmed the order as to the corporate petitioner herein.

II. There is substantial evidence to support the findings of the Commission that petitioners have falsely advertised the number of jewels in their watches which serve the purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear

The evidence is undisputed on this issue (Br. 6, 11, 27). Petitioners purchase 17-jewel watch movements made in Switzerland, add a Resevoil device containing four or eight synthetic stones, and advertise and sell the watches as "21" or "25" jewel watches. The Resevoil device is patented and con-

¹¹ *Detra Watch Case Corporation*, Docket 8597; *Delaware Watch Co.*, Docket 8411; *Savoy Watch Case Co.*, Docket 8080; *Hilton Watch Co.*, Docket 8402; *Berco, Inc.*, Docket C-621. In addition, the Commission deems the movement and watch case to be significant watch components, the foreign origin of which must be disclosed. See *Savoy Watch Case Co.*, Docket 8080, CCH Trade Reg. Rep. ¶ 16,447, 16,544 (1961-63 transfer binder); *Delaware Watch Co.*, Docket 8411, CCH Trade Reg. Rep. ¶ 16,454 (1961-63 transfer binder).

sists of a small metal plate containing the jewel-like stones whose function it is to lubricate pivots or other moving parts of a watch. The stones do not touch any moving part and do not serve any mechanical function as friction bearings. The only issue here is whether the four or eight synthetic stones in the Resevoil device fall within the definition of watch jewels, and can be included in the jewel count of petitioners' watches.¹²

Petitioners contend (Br. 27-28) that the stones in the Resevoil device are in fact jewels because they serve a lubrication function and because they are described as jewels in the patent.¹³ Each of these arguments has previously been made before this Court and before the United States Court of Appeals for the Seventh Circuit, and each has been rejected by both courts. As to the description in the patent, this Court rejected a similar contention in *Decker v. Federal Trade Commission*, 85 U.S. App. D.C. 165 (1949), 176 F. 2d 461 *cert. denied*, 338 U.S. 878. Petitioner was advertising that his product would perform in the manner described in his patent application and claiming that the granting of that application showed

¹² "[T]he industry looks upon a jewel as a small, hard, highly processed gem placed in a watch movement to contact a moving part at a point of wear." *Allen v. Tornek*, 55 F.T.C. 1770, 1772-76 (1959), *aff'd per curiam*, 107 U.S. App. D.C. 267 (1960), 276 F. 2d 513, *cert. denied*, 364 U.S. 829.

¹³ Petitioners agree (Br. 29-30) that the essence of a watch jewel is that it serve as a bearing, and that their Resevoil device does not. Nevertheless, they incredibly argue that any device merely lubricating "jewel bearings" can be properly described as such.

that the product would perform as advertised. This Court stated (176 F. 2d at 463):

Now, after the patent grant, petitioners, the present owners of the patent, have the right to sell the article and *to advertise it*, but not the right to misrepresent it. In short, the letters-patent do not cover advertising. The proceedings before the Federal Trade Commission related only to advertising. They did not draw into question the validity of the patent grant.

Referring to representations made concerning the functions of the patented device, this Court continued at pages 463-64:

It follows that such representations, which in one form or another found their way into the advertising of petitioners, do not come within the limited coverage of the patent grant. Rather do they fall under the prohibitions of general law, applicable to all who put their products for sale into the channels of commerce and trade. When they do so they can claim no immunity by reason of a patent. It cannot be made a cover for violation of law. *Standard Sanitary Mfg. Co. v. U.S.*, * * * 226 U.S. 20, 49 * * * (1912); *Virtue v. Creamery Package Co.*, 227 U.S. 8, 32 * * * (1913). "Beyond the limited monopoly which is granted, the arrangements by which the patent is utilized are subject to general law." *U.S. v. Masonite Corporation*, 316 U.S. 265, 277 * * * (1942).

A Resevoil device was before this Court in *Tornek v. Federal Trade Commission*, 107 U.S. App. D.C. 267 (1960), 276 F. 2d 513, *cert. denied*, 364 U.S. 829. The Court said at page 514:

As to the Resevoil device in question, convincing evidence indicated that the four stones of the Resevoil did not serve a mechanical function of bearing or of protection against frictional wear. Petitioner's statement that the Resevoil watches were 21-jewel watches is therefore misleading.¹⁴

The Seventh Circuit in dealing with this problem in *Waltham Precision Instrument Co., Inc. v. Federal Trade Commission*, 327 F. 2d 427, 430 (7th Cir. 1964), said:

The record shows that petitioners' "Waltham" watches contain 17-jewel movements imported from Switzerland. To these movements have been added a so-called "Resevoil" device containing eight additional synthetic stones. The Resevoil device is patented and consists of a small metal plate containing the jewel-like stones whose function is to lubricate pivots or other moving parts of the watch. They do not touch anything and do not serve any mechanical function as a friction bearing.

Petitioners' claim that the stones in the Resevoil device are in fact "jewels" (being described in the patent as such) was determined ad-

¹⁴ Petitioners attempt (Br. 28-29) to draw a distinction between the definition of a "jewel" in the Commission's order and this Court's recital of evidence in its *Tornek* decision as the basis for approving the Commission's definition of a watch jewel. Petitioners misconceive (Br. 29) the Commission's order (JA 124) as requiring two separate unexplained functions. This Court and the Commission in *Tornek* (55 F.T.C. 1770, 1772-76 (1959), *aff'd per curiam*, 276 F. 2d at 513-14) required a "jewel" to perform the one function of a friction bearing—"protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear" (JA. 124).

versely to their contention by the Commission in *In the matter of Allen V. Tornek Company*, 55 F.T.C. 1770, 1772-1775 (1959); affirmed Per Curiam, *Tornek v. F.T.C.*, D.C. Cir., 276 F. 2d 513 (1960), cert. denied 364 U.S. 829.

The fact that the patent granted on the Reservoir device described the stones as jewels granted no immunity against misrepresentations in advertisements. *Decker v. Federal Trade Commission*, D.C. Cir., 176 F. 2d 461, 463 (1949), cert. denied 338 U.S. 878.

It is submitted that the above decisions require affirmance as to the individual petitioners of the paragraph of the order involved here.

III. There is substantial evidence in the record to support the findings of the Commission that petitioners furnish vendors with preticketed, list, or advertised retail prices, which have the tendency and capacity to mislead and deceive the public as to the actual retail prices of petitioners' watches

Petitioners attach price tickets to all their watches.¹⁵ A price ticket is a label or tag upon which a dollar amount is printed for exhibition to a prospective purchaser.¹⁶ The Commission found that such amount is a representation to the customer that the article is actually sold at retail at that price (JA 123).

¹⁵ Br. 5; see also physical exhibits CXs 44, 47, 50, 53, 56, 60, 92, 95, and 98 with attached price tags.

¹⁶ "[A] preticketing policy can lead to deception when dealers habitually market a product at substantially less than the preticketed price. The courts have been quite unanimous in upholding the Commission's position that in such circumstances the tendency of preticketing is to beguile the public into thinking that they are getting a bargain and that this constitutes an unfair method of competition." *Rayex Corp. v. Federal Trade Commission*, 317 F. 2d 290, 292 (2d Cir. 1963).

Petitioners also disseminate, *inter alia*, price lists and catalog sheets listing certain advertised retail prices of their depicted watches.¹⁷ The Commission also found that petitioners' advertised retail prices in their catalog sheets represent to the purchaser that such prices are the actual retail prices at which their watches are sold (JA 123). The record demonstrates and petitioners admit (Br. 5), that the retail prices listed in their catalog sheets and on their price tickets are appreciably in excess of the highest price at which substantial sales at retail are made, whether through the catalog media or regular retail jewelers.¹⁸ The Commission found that petitioners' preticketed and advertised retail prices were fictitious and deceptive, and were not disseminated in good faith as an honest estimate of the actual retail selling price.¹⁹ The examiner found, and this finding was affirmed by the Commission, the following:

The evidence as to the deceptive nature of the advertising and use of the list prices, whether [it] be in general advertising, catalog sheets or * * * preticketing is * * * sufficient to support remedial action * * *. [JA 110, 123.]

The mechanics of catalog selling, buying, and advertising are clearly manifested in the record and are summarized here. Waltham's watch sales approxi-

¹⁷ Br. 5; *e.g.*, CX 12, JA 96-97; CX 16A; CX 18, JA 98-99; CX 19, JA 100; CX 20; CX 22, JA 101-2; CX 96D-F, J-M, Q-Z-24, JA 103-4; CXs 128, 132.

¹⁸ *E.g.*, witness Bodin purchased a Waltham watch having a price ticket of \$120.00 at retail for \$45.00 (JA 89).

¹⁹ Nowhere in petitioners' brief do they set out the facts of record which they contend (Br. 10, 23-25) do not support the Commission's findings.

mate \$6,000,000 a year to catalog wholesalers, and account for 50 percent of its business (JA 62; Tr. 391). It was stipulated that Waltham prepares and prints all its catalog sheets which depict its products, and which are submitted to the various catalog houses to become a part of a general merchandise catalog available to the public (JA 67-69, 73-74). The sheets contain pictorial advertisements of model watches, a brief description thereof, and an advertised retail price appearing opposite a coded price.²⁰ The coded price appears in a number-letter sequence (*e.g.*, 4300W2995), the latter four digits, or those appearing after the letter, being the actual price (\$29.95) at which the watch is always sold (Br. 5; JA 69, 73-74).²¹

Catalog houses sell not only to resellers, such as retailers, but also directly to consumers (JA 71, 73, 75, 88-90, 92).²² To the catalog-buying consumer the

²⁰ See CX 12, JA 96-97; CX 96Q, JA 104 for a variation where an advertised retail price is crossed out and the "Now Only" or coded price remains.

²¹ Petitioners can not deny their awareness of the catalog house practice of selling only at coded prices and not at the greatly inflated advertised retail price, since they prepare and print all Waltham catalog sheets containing coded prices. In fact, one catalog house sought Waltham catalog sheet "proofs showing our coding in position for our final approval" (CX 119, JA 105). See, *e.g.*, CX 16A; CX 18, JA 98-99; CX 19, JA 100; CX 20; CX 22, JA 101-2; CX 96J, JA 103-4; CXs 128, 132. Instructions for deciphering the actual or coded price of Waltham watches appear in the catalog (JA 70).

²² Catalog sales of Waltham watches to consumers are substantial—40% to 45% of a catalog wholesaler's business being consumer sales (JA 72). The General Merchandising Company alone sold over \$90,000 during the last quarter of 1959 (JA 67-68; CX 100). In one small town the company had over 1,000 catalog-buying consumers (JA 72); see also JA 74-75.

actual retail price of a Waltham watch is the coded price, not the advertised retail price listed in the catalog (Br. 5; JA 70-72, 88-92).²³ To the catalog-buying retailer the coded price is "dealers cost," and the retailer's markup is added to obtain the actual retailer-jeweler's price.

The record reveals that the coded price, which all catalog customers pay (Br. 5; JA 25-26, 70, 73-74), is always substantially less than Waltham's advertised retail price.²⁴ Indeed, petitioners even stipulated that no one ever purchases at the advertised retail price when buying through the catalog (JA 70-71, 73-74). Occasionally, a retailer can purchase at 10 percent less than the coded price enabling him to resell to consumers at the coded price, while maintaining a profit margin of 10 percent (JA 91).²⁵ However, most catalog-buying retailers purchase at the coded price

Exhibit	"Now only" or actual retail price in code	Advertised retail price
CX 12A, JA 96.....	(349W3030) \$30.30	\$110.00
CX 12B, JA 97.....	(2348K3170) 31.70	125.00
CX 22, JA 101.....	(4449P5830) 58.30	175.00
CX 22, JA 101.....	(4450P9260) 92.60	275.00

See also CX 16A; CX 18, JA 98-99; CX 19, JA 100; CX 20; CX 96, JA 103-4 for identical mechanics.

²⁴ *E.g.*, consumer witness Harral paid the coded price of \$15.95 for a watch advertised at \$54.95 (JA 88). Another purchased a "Waltham" for \$45.00, preticketed at \$120.00 (JA 89). Still others paid coded prices of \$15.82 and \$24.45 for watches advertised at \$55.00 and \$71.50, respectively (JA 82, 85-86; Tr. 249, 257).

²⁵ Some retail stores maintain catalogs and will sell Waltham watches via the catalog to the over-the-counter consumer at the coded price (JA 92). Such retailers never sold at the catalog's advertised retail price (JA 93).

and add a markup to attain their retail price. Petitioners' own evidence establishes that the retailers' markup on watches in the United States is normally 100 percent (JA 76-77).

Thus, the record makes clear, as manifested by the chart in the margin, that even the retailer, buying at the coded price, would always resell Waltham watches at substantially less than petitioners' advertised retail price.²⁸ The record shows that the highest retail price at which Waltham's watches would ever be sold is the coded price plus the 100 percent markup. In every record instance (*e.g.*, chart), this leaves the advertised retail price substantially in excess of the actual retail price of petitioners' product (JA 68-69).

The truth of the above is borne out by the only retailer placed on the stand by the defense. Retailer

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Watch Cost Data

CX	A	B	C	D
	Retail dealer's cost or coded price	Highest actual retail selling price applying retailer's 100% markup	Advertised retail price	C-B represented fictitious savings
30.....	\$30.35	\$60.70	\$79.50	\$18.80
32.....	26.80	53.60	85.00	31.40
34.....	24.65	49.30	85.00	35.70
36.....	28.30	56.60	79.50	22.90
43.....	30.25	60.50	95.00	34.50
46.....	30.35	60.70	97.50	36.80
49.....	27.40	54.80	71.50	16.70
52.....	37.50	75.00	92.50	17.50
55.....	33.40	66.80	95.00	28.20
58.....	19.90	39.80	49.50	9.70
91.....	31.15	62.30	100.00	37.70
94.....	15.90	31.80	57.50	25.70

Column "A" is the coded price or dealer's cost for certain of petitioners' watch models. "C" is their advertised retail price appearing on a price ticket or in catalog sheets for that model (JA 25-26). "B" is the actual retail selling price arrived at by applying the normal 100 percent markup to a retailer's cost, the coded price (JA 76-77).

Andres purchased a Waltham watch, advertised at \$120.00, for the coded price of \$46.50 (JA 95). He resold this watch at retail for \$80.00, or some \$40.00 less than Waltham's advertised retail price (JA 95). Mr. Andres testified that while he always sells Waltham watches above his cost, the coded price, he never receives the preticketed or advertised retail price indicated in the catalog (JA 95).²⁷

It is apparent, in view of all the evidence, that petitioners' advertised retail prices are never the actual retail selling prices, and are always substantially in excess of the highest retail prices at which Waltham products are sold. Moreover, petitioners' attempted justification of their preticketing practice by producing defense witness Heald resulted in its condemnation. Heald, Executive Secretary of the Wisconsin Retail Jewelers' Association, not only condemned the practice of "excessive preticketing" but also believed Waltham was guilty of "excessive price tagging" (JA 77). The evils of fictitious pricing were expressed by petitioners' own witness, as follows:

* * * I do know that * * * Waltham Watch Company was disposing of their watches by excessive pre-ticket *with a fictitious bargain* * * * [JA 78; see also JA 79-80].

The mechanics of the deception were even explicated. For instance, a retail jeweler points to a price tag

²⁷ He purchased another watch at the coded price of \$48.65 which had an advertised retail price of \$135.00 (Tr. 343-44). Even applying the normal retailers markup of 100 percent to the retailers cost, the coded price, the actual retail selling price would be \$97.30, substantially less than petitioners' advertised retail price of \$135.00. See also JA 94 where he resells watches for \$60 less than the advertised retail price.

saying "this is the price," and then proceeds to inform the consumer of his lower price thereby making the sale (JA 77). Consumers testified that they compared the coded price in the catalog with the advertised retail price, believed the latter to be the actual retail price, and thought they were saving the difference (JA 80-81; Tr. 273).

This Court has on two occasions recently condemned deceptive pricing practices:²⁸ *Giant Food Inc. v. Federal Trade Commission*, 116 U.S. App. D.C. 227 (1963), 322 F. 2d 977; *Helbros Watch Company, Inc. v. Federal Trade Commission*, 116 U.S. App. D.C. 231 (1962), 310 F. 2d 868, *cert. denied*, 372 U.S. 976 (1963).²⁹

In the latter case the court said (310 F. 2d at 869):

Fictitious pricing in the form of false "pre-ticketing" is the now wide spread practice, particularly among, but by no means limited to, manufacturers, of representing, usually on the package or the article itself, a retail price substantially higher than the actual price to the

²⁸ Petitioners choose to ignore the precedents in this Court but claim, relying upon three Commission cases (Br. 25-27), that there is an internal agency dispute concerning the Commission's Pricing Guides and that this somehow, though unexplained, affects them. Petitioners admit (Br. 25) that the results of two cases are consistent with that here and that the third was dismissed for insufficient evidence. Because various Commissioners on different facts differ from case to case, while the decisions of the majority remain consistent, is no basis for reversal. Dissenting on the facts is a common practice that occurs daily in our judicial system.

²⁹ For a recent case involving both fictitious pricing and false guarantees, see *Coro, Inc. v. Federal Trade Commission*, 1st Cir. No. 6267, November 10, 1964.

consumer. Its vice is its deception and the understandable inability of the price-conscious consumer to control his urge to make a "good buy."

In the *Giant* case it was held that "a manufacturer can be prevented from placing a deceptive price on its product * * *,"³⁰ and the Second Circuit is "in complete agreement with the Commission and the other Circuits that this apparently prevalent practice is not to be condoned and that such deception of the buying public should be eliminated."³¹ *Rayex Corp. v. Federal Trade Commission, supra*, 317 F. 2d at 292.

In *Helbros, supra*, this Court held that since there was no dispute as to the illegality of fictitious pricing,³² the only question remaining was whether the

³⁰ This Court concluded in that case (322 F. 2d at 985) that this determination is within the power and province of the Commission, not the courts:

"It is the function of the Commission to pass upon the weight to be accorded to the evidence before it; and to make the choice, if necessary, between varying inferences which might be drawn therefrom. The possibility of drawing either of two inconsistent inferences from the evidence does not prevent the Commission from drawing one of them."

³¹ "The meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact to be determined by the Commission and should be upheld by a reviewing Court unless arbitrary or clearly wrong." *Kalwajtya v. F.T.C.*, [237 F. 2d 654, 656 (7th Cir. 1956)]; see also *A.P.W. Paper Co. v. F.T.C.*, 149 F. 2d 424 (2d Cir. 1945), *aff'd*, 328 U.S. 193 * * * (1946); *Gulf Oil Corp. v. F.T.C.*, 150 F. 2d 106 (5th Cir. 1945)." 322 F. 2d at 982, n. 12.

³² "Fictitious prices are illegal even though it is obvious to the sophisticated that the price tag is only a come-on. 'The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the un-

Commission's finding "is supported by substantial evidence upon the record viewed as a whole" (310 F. 2d at 869). Helbros, like Waltham, sold about half of its preticketed watches to catalog houses which resold the watches to consumers and retailers. There, like here, the evidence showed "that petitioners knew of the practice of * * * catalog houses to sell far below the pre-ticketed price * * *" (310 F. 2d at 870, n. 7). Waltham, of course, is aware that its watches are never sold at its preticketed or advertised retail price because it prints and proofs all catalog sheets containing the coded prices at which the watches are actually sold (CX 119, JA 105). Moreover, even defense witness Andres testified that, as a retailer, he never sells at the preticketed or advertised retail price (JA 95). This Court in *Helbros* rejected arguments substantially identical to those made here (Br. 10-11), even though in that case there was "some evidence that the jobbers and ordinary retail jewelers sell their watches at the pre-ticketed price" (310 F. 2d at 870). No such evidence exists here.

Petitioners, by suggesting (Br. 5, 10) that a catalog sale is not a sale at retail and therefore no substantial evidence exists that Waltham watches sell at retail below the preticketed or advertised retail price, reiterate the same argument that was rejected in *Helbros*: "A retail sale is the transaction by which the merchandise comes into the possession of the ultimate consumer, regardless of the title by which the vendor thinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." 310 F. 2d at 869, n. 4.

may choose to denominate himself" (310 F. 2d at 870). Catalog houses do retail Waltham watches direct to the consumer at the coded price which is always substantially below petitioners' preticketed or advertised retail price.³³ The clinching factor here is that 50% of all Waltham sales are to catalog houses which market Waltham products to consumers, directly and through retailers, at prices always substantially below petitioners' preticketed or advertised retail prices (*supra*, pp. 23-6). This Court believed that since at least 40% of all sales of Helbros watches were through catalog houses at substantially less than the preticketed price, "[t]his is sufficient to constitute fictitious pricing."³⁴

In this case petitioners did not, and could not, rebut the evidence that their watches are always resold at

³³ As previously stated, catalog-buying retailers paying the coded price, after applying normal markups, still sell over-the-counter to consumers at substantially less than petitioners' advertised retail or preticketed prices. See n. 26, *supra*, p. 25. Although the catalog-buying consumer might have saved money by buying through the catalog rather than over-the-counter, the savings were not those represented by the difference between the coded price and the advertised retail price, but the difference between the coded price and the retailers' markup. This retail price is still substantially lower than petitioners' advertised retail price. Deception, of course, was still employed, and it is this misleading initial contact with the public which violates the law. *Carter Products, Inc. v. Federal Trade Commission*, 186 F. 2d at 824; *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 115-16 (1937); *Fairyfoot Products, Inc. v. Federal Trade Commission*, 80 F. 2d 684, 687 (7th Cir. 1935).

³⁴ 310 F. 2d at 869-70, citing *Baltimore Luggage Co. v. Federal Trade Commission*, 296 F. 2d 608, 611 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962).

retail at prices which are substantially less than the advertised retail prices.³⁵

IV. There is substantial evidence in the record to support the findings of the Commission that petitioners' advertisements of guarantee have the tendency and capacity to mislead and deceive the public as to the nature, extent, conditions, and manner of performance of their watch guarantees

It is unnecessary to examine all of the numerous advertisements in evidence, for it is undisputed that petitioners advertise their watches as "Guaranteed," "Fully Guaranteed," "Lifetime Guaranteed," and "Unconditionally Lifetime Guaranteed." Such representations are featured prominently on all of petitioners' catalog sheets and tags attached to their watches.

It should be made clear at the outset that the complaint in this case is directed at the misleading advertisements and representations of guarantee, and not at the terms of the guarantee itself. Nowhere in the advertisements do petitioners reveal that there is a charge imposed before the watch will be repaired pursuant to guarantee. This is not disclosed until a

³⁵ Petitioners contest (Br. 10-11, 25) the Commission's reference to its Guides Against Deceptive Pricing, 29 Fed. Reg. 178 (1964), as being an aid to petitioners in complying with the order. The Guides themselves state that "the Guides are not intended to serve as comprehensive or precise statements of law, but rather as practical aids to the honest business man who seeks to conform his conduct to the requirements of fair and legitimate merchandising." They serve as a caveat "to the unscrupulous few whose aim it is to walk as close as possible to the line between legal and illegal conduct." Therefore, any factual situation, like here, which is clearly at variance with the minimum guidelines for fair pricing practices, is sufficient to support a cease and desist order. Petitioners' representation of a fictitious bargain (JA 78) is proof of a lack of good-faith honest estimate of the actual retail price.

purchase is made and the purchaser has access, for the first time, to the actual terms of the guarantee.³⁶ Then he learns to his surprise, as shown by the evidence, that he must pay at least \$1.00 for the repair of his watch.

It is sufficient if the advertisements themselves are in evidence to prove their falsity,³⁷ *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 168 (7th Cir. 1942), and it is settled that "[t]he Commission may require advertisements to be so carefully worded as to protect the most ignorant and unsuspecting purchaser." *Progress Tailoring Co. v. Federal Trade Commission*, 153 F. 2d 103, 105 (7th Cir. 1946).

We submit that the advertising material and catalog sheets in the record here are more than substantial evidence of the deceptive character of the representations.³⁸ The court in *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509, 511 (7th Cir. 1946), stated:

³⁶ Petitioners rely (Br. 30) solely on a guarantee certificate (CX 28A) which is inserted into a watch box (JA 32-34) and is rarely if ever seen or read by a prospective purchaser until after the sale is completed.

³⁷ Proof of actual deception of purchasers need not be shown in Federal Trade Commission proceedings. *Koolish v. Federal Trade Commission*, 129 F. 2d 64, 65 (7th Cir. 1942), cert. denied, 317 U.S. 683; *Perloff v. Federal Trade Commission*, 150 F. 2d 757, 759 (3d Cir. 1945); *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F. 2d 676, 680 (2d Cir. 1944). It is sufficient that the advertisements have the tendency and capacity to deceive. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

³⁸ See e.g., CX 12, JA 96-97; CX 18, JA 98; CX 19, JA 100; CX 22, JA 101-2.

After viewing all the advertisements we can not say as a matter of law that the Commission was arbitrary in inferring that deception might occur to an inattentive reader of the advertisement, misleading him into the belief that purchase of such a pen would give him a lifetime of satisfactory use, *with no expenditure required.*

* * * * *

* * * Their purport * * * is that the Commission's duty is to protect the casual, one might even say the negligent, reader, as well as the vigilant and more intelligent and discerning public. [Emphasis supplied.]

In discussing the legal incidents of a "guarantee" the court said: "Aside from *Cobb v. Truett*, * * * the law seems silent. From such silence we deduce the inference that a guarantee per se negatives the idea of a further consideration" (159 F. 2d at 511).

It should be pointed out that in the *Parker Pen* case the advertisements stated, in small print located some distance from the statement of "lifetime guarantee," that there was a service charge. In the instant case not even that type of disclosure was made.

Even though not required to do so, the Commission did call members of the purchasing public as witnesses to prove that petitioners' advertisements are misleading. No witness for the Commission that observed Waltham's representations of guarantee understood that there was to be a service charge for repairs, and they were very much surprised upon learning that a

service charge was assessed.³⁹ "Advertising of a so-called 'lifetime guarantee' without clear disclosure that a charge is made in conjunction therewith is an unfair and deceptive trade practice." *Clinton Watch Co. v. Federal Trade Commission*, 291 F. 2d 838, 840 (7th Cir. 1961); *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509, 511 (7th Cir. 1946). It is this misleading first contact with the public, inducing a purchase based upon a representation of guarantee, which violates the law. *Carter Products, Inc. v. Federal Trade Commission*, 186 F. 2d 821, 824 (7th Cir. 1951).

Moreover, the purchaser buying via catalog sheets is even more vulnerable to deception than under ordinary circumstances, since he cannot examine the guarantee certificate and discover the service charge until after purchase and receipt of the watch. Plainly the practice is unfair and deceptive, and was properly prohibited by the Commission's order.

³⁹ " * * * I couldn't figure out when the guarantee was to be a lifetime guarantee * * * why I would have to pay * * * two months later for the thing" (JA 86). See also JA 78-84, 86-87. See CX 71 as exemplary of consumer attitudes: "[T]he watch was still in warranty and [I] was of the opinion that there should be a no-charge repair." See also CX 79.

CONCLUSION

For the foregoing reasons, the Commission's order to cease and desist should be affirmed and enforced.⁴⁰

Respectfully submitted.

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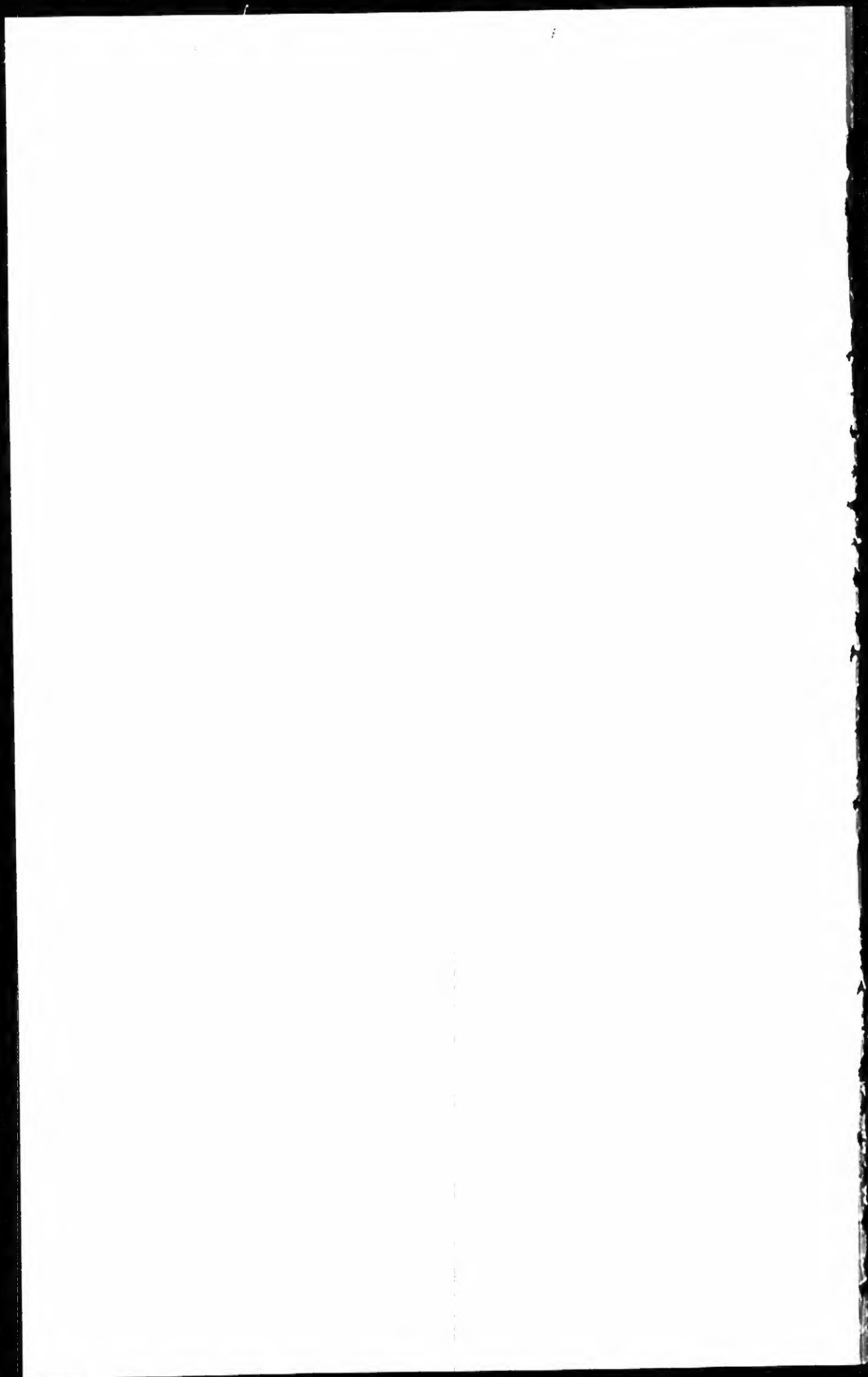
Attorneys for the Federal Trade Commission.

WASHINGTON, D.C.

November 1964.

⁴⁰ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Sec. 5(c), 52 Stat. 113, 15 U.S.C. 45(c).

APPENDIX



United States Court of Appeals for the District
of Columbia Circuit

Received June 24, 1964

DIVISION OF APPEALS

No. 18,647, September Term, 1963

WALTHAM WATCH COMPANY, A CORPORATION, AND
HARRY ARONSON, BEN COLE AND MORRIS DRAFT, IN-
DIVIDUALLY AND AS OFFICERS OF SAID CORPORATION,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Before: FAHY, Circuit Judge, in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: June 24, 1964.

(1a)

In the United States Court of Appeals for the District
of Columbia

Entered June 23, 1964

Civil Action No. 18,647

WALTHAM WATCH COMPANY, A CORPORATION, AND
HARRY ARONSON, BEN COLE AND MORRIS DRAFT, IN-
DIVIDUALLY AND AS OFFICERS OF SAID CORPORATION,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PREHEARING STIPULATION AS TO ISSUES

I. It is stipulated by and between petitioners and respondent, subject to the approval of the Court, that the issues presented in this review may be stated as follows:

A. Is there substantial evidence to support the findings of the Commission that petitioners have falsely advertised the number of jewels in their watches which serve the purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear?

B. Is there substantial evidence in the record to support the findings of the Commission that petitioners have falsely represented that their watches are manufactured in their entirety in the United States by the original Waltham Watch Company of Massachusetts?

C. Is there substantial evidence in the record to support the findings of the Commission that petitioners furnish venders with preticketed, list or adver-

tised retail prices, which have the tendency and capacity to mislead and deceive the public as to the actual retail price of petitioners' watches?

D. Is there substantial evidence in the record to support the findings of the Commission that petitioners' advertisements of guarantee have the tendency and capacity to mislead and deceive the public as to the nature, extent, conditions, and manner of performance of petitioners' watch guarantees?

II. It is also stipulated that the foregoing statement of issues, while sufficiently inclusive and as accurately formulated as is practicable at this time, is not necessarily a final formulation thereof.

Respectfully submitted.

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WASHINGTON, D.C.

Dated: June 16, 1964.